Supreme Court, U.S.
FILED
SEP 13 1985
JOSEPH F. SPANIOL, JR.
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85-429

No. 85-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EXXON CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

In what appears to be the largest money judgment ever entered against a private defendant in American history, Exxon Corporation has been summarily adjudicated liable for two billion dollars for supposed violations of price control regulations with respect to crude oil. The question presented is whether this exaction, based on an extraordinary patchwork of retroactive and discriminatory regulatory interpretations, deprives Exxon of property without due process of law and in violation of the central canons of fairness in administrative law laid down by this Court. More particularly, the questions presented are:

1. Whether it is lawful, under the Constitution and laws of the United States, for a firm to be held liable for two billion dollars on the basis of an interpretation of a price control regulation that the administering agency itself has repudiated as inimical to the purposes of the regulatory scheme?

2. Whether it is lawful for a firm to be subjected to such a liability on the basis of a regulation, itself couched in general and prospective terms, which has been interpreted without reasoned explanation so that (a) some persons are subjected to its burdens retroactively but are denied its benefits altogether while (b) similarly situated persons escape retroactive application of its burdens and yet enjoy its benefits to the full?

3. Whether it is lawful for an agency to ignore its own rule providing that the application of a harsh retroactive regulatory standard will be mitigated by permitting persons on a case-by-case basis to establish a reasonable alternative date for compliance, and for the courts then to refuse to conduct any comparable judicial hearing?

4. Whether, in administering a statutory remedy providing only for "restitution of moneys received," the lower courts may, without any attempt to balance equities, simply order a defendant to pay, with substantial prejudgment interest, amounts that it did not receive to persons who did not suffer harm?

PARTIES TO THE PROCEEDING

In addition to Exxon Corporation * and the United States, the following persons were parties to the proceeding in the court of appeals:

Air Transport Association of America
American Petroleum Refiners Association
Anthony Monaco t/a Milltown Exxon Servicenter
Ashland Oil, Inc.
Champlin Petroleum Company
Commonwealth of Pennsylvania
Commonwealth of Puerto Rico
Commonwealth of Virginia
Consumers Power Group
District of Columbia
Donald E. Skilling t/a Edon Service Corp.
Edward McGovern t/a Maple Avenue Exxon
Geraldine H. Sweeney
Luther Griffin t/a Palmer Highway Exxon
Marathon Petroleum Company
Mississippi Department of Energy and Transportation
Mobil Oil Corporation
Murphy Oil Corporation
National Freight, Inc.
National Oil Jobbers Council
Pennzoil Company
Philadelphia Electric Company
RJG Cab, Inc.
Rex Shipley t/a Shipley's Standard Service
State of Alabama
State of Arkansas
State of California
State of Colorado
State of Delaware
State of Hawaii
State of Idaho

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* Exxon's affiliates and partially owned subsidiaries are listed at App. K, *infra*.

State of Illinois
State of Indiana
State of Iowa
State of Kansas
State of Louisiana
State of Michigan
State of Minnesota
State of Nebraska
State of Nevada
State of New Jersey
State of New Mexico
State of New York
State of North Carolina
State of North Dakota
State of Ohio
State of Oregon
State of Rhode Island
State of Tennessee
State of Texas
State of West Virginia
State of Wisconsin
Tenneco Oil Company
Territory of Guam
Territory of the Virgin Islands
Texas City Refining, Inc.
Tosco Corporation

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v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Exxon Corporation ("Exxon") hereby petitions for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States ("TECA") to review a judgment against Exxon in the amount of $2,011,014,887.25, including interest through August 31, 1985.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is not yet reported.[1] The opinion of the district court (App. B) is reported at 561 F. Supp. 816.[2]

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1985. A timely petition for rehearing was denied on August 15, 1985 (App. C). This Court's jurisdiction is invoked under section 211(g) of the Economic Stabilization Act of 1970, *as amended*, 12 U.S.C.A. § 1904 note (1980), as incorporated by section 5(a)(1) of the Emer-

[1] "App." refers to the separately bound appendix that accompanies this petition.

[2] Interlocutory opinions of the court of appeals are reported at 655 F.2d 1112 (App. E) and 616 F.2d 526 (App. H). Interlocutory opinions of the district court are reported at 94 F.R.D. 252 (App. D) and 470 F. Supp. 674 (App. I). Two other interlocutory opinions of the district court (App. F and App. G) are not reported.

gency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, 633.

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States in pertinent part provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The pertinent provisions of section 209 of the Economic Stabilization Act of 1970, *as amended*, 12 U.S.C.A. § 1904 note (1980), of section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 (1982), and of 10 C.F.R. §§ 212.72 and 212.75 are set forth at App. J.

STATEMENT

1. *Introduction.* The enhancement of domestic crude oil production was a central objective of national energy policy in the early 1970's. This case arises out of Exxon's effort to further that policy by implementing an enhanced recovery project to reverse the natural decline in production at Hawkins Field, one of the largest oil fields in the United States. The project cost more than $220 million and will result in the recovery of an incremental 70 million barrels of crude oil. Exxon now has been told that this effort triggered an unanticipated obligation to reduce the price of oil produced from the field to a level that left Exxon far worse off than if it had simply done nothing. As its reward for increasing domestic production, Exxon has been held liable for more than two billion dollars.

The lower courts imposed this staggering liability—the largest such money judgment in American legal history—without a proper basis in law. Exxon has been singled out for liability on the basis of an incoherent patchwork of discriminatorily selected bits and pieces of administrative regulations (some formally repudiated by the agency and nevertheless enforced by the courts; some concocted by picking and choosing only the harsh and ignoring the mitigating features of the very same regulation; some

construed to create bizarre and irrational distinctions among regulated enterprises; all invented after the fact and retroactively applied). This was done, moreover, without any semblance of either an administrative hearing or a court trial at which Exxon would have had an opportunity to make the factual showing called for by the agency's own rules.

To cap it all off, the courts held Exxon liable for the supposed overpricing not only of crude oil it produced itself but also of oil produced and sold by others; they charged Exxon interest for the use of hundreds of millions of dollars that it never received; and they awarded "restitution" to the several States because they were unwilling to determine who, if anyone, actually had been injured.

2. *Events leading to formation of the Hawkins Field unit on January 1, 1975.* The Hawkins Field, located in eastern Texas, covers more than 300 leases and is one of the largest oil fields in the continental United States. R. 23395, 29742-43, 27982-83.[3] Exxon owns working interests in roughly two-thirds of the field's crude oil production. R. 27993. Rights to the remaining production are held by approximately 300 working interest and 2,200 royalty interest owners. R. 27991, 29743.[4]

By the 1960s, a serious decline in reservoir pressure at Hawkins Field was causing the irrecoverable loss of crude oil underground. R. 27985-88. The decline in pressure could be slowed somewhat by recycling the field's production of natural gas back into the reservoir. *E.g.*, R. 27988, 10461-63. But the decline could be ended or reversed only by instituting an "enhanced recovery" project involving manufacture and injection into the reservoir

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[3] "R." refers to the record on appeal.

[4] In a typical oil and gas lease, the landowner retains a 1/8 "royalty interest" in production and conveys a 7/8 "working interest" to the mineral lessee. *See* WILLIAMS & MYERS, MANUAL OF OIL AND GAS TERMS, 838-39 (1982).

of massive quantities of inert gas. *E.g.*, R. 27988, 9866-72.

An interim recycling project was undertaken at Hawkins Field beginning in 1969. R. 27988, 23785. But an enhanced recovery project could not be undertaken until the interest owners entered into a "unit agreement" under which operating costs and ownership of production would be shared on a field-wide basis. R. 27990-91. Such an agreement was necessary both because of the costs involved—the equipment investment costs were about $102 million, and through 1981 the operating and maintenance costs of unitized operations were about $120 million, R. 27992—and because the injection of massive quantities of inert gas, unlike the mere recyclying of natural gas, forces movement of crude oil underground across lease lines and thus affects the relative amount of oil that can be recovered from each lease. R. 10113-14, 11640.

The interest owners met in 1971 to discuss the need for unitization and enhanced recovery. App. 185a. Protracted negotiations followed. *E.g.*, R. 16175-78, 14641-44. While these negotiations were in progress, the federal government imposed so-called "two-tier" price controls on crude oil:

> Producers were required to sell "old" crude oil at the lower-tier price and were allowed to sell "new" crude oil at a higher price. Amounts of "old" and "new" oil were calculated by comparing current production at a given property to that property's production in [the] corresponding [month of 1972], its "base production control level" ("BPCL"). Any excess of current production above the BPCL could be sold as higher-priced new oil. All current production up to the BPCL, however, had to be sold as lower-priced old oil. . . . "Property" was defined as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum."

App. 175a-177a (footnotes and citations omitted).

By 1974, approximately 34 percent of the production at Hawkins Field constituted "new oil" qualifying for

the higher "new oil" price under these two-tier controls. R. 29743, 31482-83. Over time, in the absence of unitization and enhanced recovery, a substantial portion of the field's production would have continued to qualify for the higher new oil price. R. 31495, 31479-80.[5] If price controls were to apply to the field in the same manner before and after unitization, with production from each lease being compared with the BPCL for that lease, then a large share of total production would, as before, qualify for the new oil price. On the other hand, if price controls were to apply to the field differently after unitization—with total production from the unit being compared with a single BPCL retroactively constructed for the entire unit (a "unit BPCL")—virtually no production would qualify as new oil.[6]

Those interest owners who would have been entitled to substantial quantities of new oil in the absence of unitization would have blocked the effort to unitize if they had known that, as a result of unitization, the field would

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[5] This resulted both from a field-wide increase in production after 1972 and from the fact that production was increasing on leases in the more "capable" parts of the field as it decreased elsewhere. R. 29751, 10469-70. A well is "capable" if it can produce at the rate allowed (the "allowable") by the Texas Railroad Commission ("TRRC"). Production at Hawkins Field was governed by Maximum Efficient Rate ("MER") rules administered by the TRRC. Under MER rules, as wells in less productive or capable portions of the field become unable to produce at their allowable rate, their excess allowables are redistributed among other wells. As a consequence, production at Hawkins Field was continuously increasing at some leases, and decreasing at others, even before unitization. *See generally* R. 29749-51. MER rules lawfully resulted in the reporting of substantial quantities of new oil as production shifted to more capable leases. *See* 41 Fed. Reg. 1564, 1571-72 (1976).

[6] The courts below determined that during the period of price controls less than 7 percent of the field's production qualified for new oil prices when unit production was measured against a retroactively constructed unit BPCL. *See* R. 31482-83, 31495. In contrast, if unitization simply had been postponed until September 1, 1976, approximately 55 percent of the field's production would have constituted new oil. R. 31480-83, 31495.

lose virtually all of its new oil production. *E.g.*, R. 17384-86, 13370-71, 16179-82. Enhanced recovery was expected to increase production substantially over the life of the field, R. 27992, but on a present value basis the increased revenue from that incremental production would not even make up for the revenue lost from converting the field's new oil into old oil, let alone compenstate for the additional expenditure of more than $220 million. R. 31483-84, 31495.[7] Advance notice that a unit BPCL would be required would have sounded the death knell for unitization at Hawkins Field.

There was no indication, however, that unitization required abandonment of lease-by-lease accounting and adoption of a unit BPCL. To the contrary, the signs pointed in the opposite direction. The key regulatory term, "property," was specifically defined in terms of "a lease or . . . a fee interest," 10 C.F.R. § 212.72 (1975), with no reference at all to units. Even more important, the regulatory objective of increasing production, *e.g.*, R. 28746-52, would be defeated by an interpretation that discouraged enhanced recovery. The agency charged with administering the controls, the Federal Energy Administration ("FEA"), appeared to be interpreting the regulations in a manner consistent with that objective. Exxon was aware, for example, that in March and July, 1974, the agency had advised Austral Oil Company and Pennzoil Company, which were contemplating forming units, "that no formal, written agency interpretations of the property regulation would be forthcoming, but that lease-by-lease accounting was acceptable." App. 232a. *See also, e.g.*, R. 6117-18, 6124, 29852, 4822. A senior agency official, speaking at a public conference, later confirmed FEA's position that lease-by-lease accounting

[7] The net result of adopting a unit BPCL, therefore, would be to reduce the field's aggregate value. The district court speculated that this problem could have been solved by adjusting the participation formula for the unit. App. 201a n.24, 208a-209a n.30. But the problem of a smaller pie cannot be solved by giving some persons bigger pieces.

remained appropriate after unitization. R. 29755-56; App. 233a & n.46.[8]

Exxon and the other interest owners reasonably concluded, on the advice of counsel, that unitization would not mandate a change in the manner in which the price controls applied to Hawkins Field. *E.g.*, R. 5360-62, 5232. (The contrary assertions by TECA and the district court—that Exxon knew that a unit BPCL was required—assumed Exxon's awareness of five supposed "Interpretations" by FEA's Office of General Counsel. Those "Interpretations," however, were secret. They were not made public until 1977, *see* App. 9a-10a, and Exxon had no knowledge of them prior to unitization. R. 6171-74.)[9] The interest owners entered into the unit agreement effective January 1, 1975, and named Exxon to operate the unit. R. 28052. Under the agreement, each interest owner was entitled to take its share of production in kind and to determine the price at which it would be sold. R. 28054. Exxon purchased most of the crude oil for use in its refinery, R. 27993, but one major interest owner, Texaco, Inc., took its share of the oil for use in its own refinery. *E.g.*, R. 19687.

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[8] Exxon had requested an interpretation from FEA with respect to the regulatory term "property" in connection with another matter but was advised that there would be no formal written response to requests concerning that term for "a long time." R. 29763. The agency commonly took two years or more to respond to requests for interpretation. R. 11841, 31919. Long delays were "endemic to the FEA's Office of General Counsel." *Standard Oil Co. v. FEA*, 453 F. Supp. 203, 216 n.69 (N.D. Ohio), *aff'd*, 596 F.2d 1029 (TECA 1978). For more than two years after the promulgation of § 212.72, "no official guidance was provided." *Atlantic Richfield Co.*, 5 DOE ¶ 82,521 at 85,077 (1980).

[9] Indeed, Exxon had sought disclosure of any and all relevant interpretations under the Freedom of Information Act, and the agency had refused to disclose the very interpretations upon which the lower courts relied. R. 6133-37. The courts' use of those interpretations violated 5 U.S.C. § 552(a)(1) ("a person may not in any manner . . . be adversely affected by, a matter required to be published in the Federal Register and not so published").

For more than two years after unitization, Hawkins Field continued to be operated essentially as before. *E.g.*, R. 9866, 10461-62, 10467. Natural gas continued to be recycled in order to slow the decline in reservoir pressure, and under the applicable MER rules production continued to shift to the more capable parts of the field as incapable wells lost production or were shut in. R. 16843-46, 29752-53, 10469-70. Until the underlying regulatory scheme was definitively changed on September 1, 1976, the interest owners continued to account for production on a lease-by-lease basis, treating each lease as a separate property for regulatory purposes as they had done prior to unitization. As a consequence, approximately 56 percent of Hawkins Field production qualified as new oil during this time—not a great increase over the amount that would have qualified in the absence of unitization. *See* note 6, *supra*. And at all times Exxon "accurately represent[ed] its conduct to the agency." App. 260a.

Enhanced recovery began in March, 1977, when the inert gas plant was completed and put into operation. R. 13678-80. As a result of enhanced recovery, the life of the field has been extended and approximately 70 million barrels of additional crude oil will be produced. R. 27992.

3. *Regulatory developments subsequent to unitization.* Following unitization at Hawkins Field, FEA began a bewildering odyssey of regulatory shifts and reversals, repeatedly changing its mind about the appropriate method of accounting for unitized production.

a. *In August, 1975, FEA retroactively rules that lease-by-lease accounting must be abandoned and a unit BPCL adopted immediately upon unitization, even though it earlier had privately advised that lease-by-lease accounting continued to be appropriate after unitization.* During 1974, when Exxon and the other interest owners at Hawkins Field were making their decision to unitize, FEA informally had been advising producers that they could continue lease-by-lease accounting after unitization.

But in August, 1975, eight months after unitization at Hawkins Field, FEA abruptly announced in its Ruling 1975-15 that "where a unit consists of several leases that were unitized [after 1972], the property consists of the unit, and the BPCL is the total 1972 monthly production from all of the several leases that now comprise the unit." 40 Fed. Reg. 40832 (1975). That Ruling, which imposed a rigid *per se* rule requiring adoption of a unit BPCL immediately upon unitization, completely undercut the economic rationale for unitization and enhanced recovery at Hawkins Field. The effect of Ruling 1975-15 was suddenly, and retroactively, to deprive the field of almost all new oil and thereby reduce the field's present value substantially below what it would have been in the absence of unitization and enhanced recovery. R. 31495.

b. *In February, 1976, FEA rescinds its earlier ruling ab initio and rules that lease-by-lease accounting may be continued until the occurrence of a "significant alteration in producing patterns."* It did not take FEA long to realize that Ruling 1975-15 would defeat the regulatory purpose of increasing the production of domestic crude oil.[10] As the district court noted, "Ruling 1975-15 sparked criticism from the oil industry that the unit BPCL requirement would discourage unitization and hence retard efforts to increase domestic production." App. 179a. FEA's General Counsel advised Exxon that it could continue lease-by-lease accounting at Hawkins Field "for a reasonable period of time," R. 29906, and FEA announced that it would reconsider whether "the Ruling has correctly interpreted current regulations." 41 Fed. Reg. at 1569.

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[10] Indeed, just four days after issuance of Ruling 1975-15, FEA's formal adjudicatory arm, the Office of Exceptions and Appeals, held that lease-by-lease accounting was required by the regulations and that a unit was not permitted to adopt a unit BPCL—precisely the opposite of what Ruling 1975-15 purported to require. *Empire Drilling Co.*, 2 FEA ¶ 83,142, *aff'd*, 2 FEA ¶ 80,676 (1975). *See also Sun Oil Co.*, 2 FEA ¶ 83,075 (1975).

On February 1, 1976, after notice and opportunity for public comment, FEA flatly repudiated the position taken in Ruling 1975-15. The agency stated that an important purpose of two-tier price controls was "to provide additional incentives for enhanced recovery," 41 Fed. Reg. 4931, 4932 (1976), and it acknowledged that the interpretation set forth in Ruling 1975-15 "may act in some cases to discourage projects designed to increase production, such as the initiation of enhanced recovery projects in unitized fields, and may in other cases act to discourage unitization altogether," *id.* at 4936. FEA pointed out in particular that a producer would be "discouraged from entering a unitization agreement to facilitate an enhanced recovery project . . . if the effect of unitization would be to reclassify some of his current [new oil] production as [old] oil." *Id.* at 4938.

The obvious implication of this analysis was that no producer should be required to adopt a unit BPCL if to do so would reduce the amount of new oil to which it had been entitled prior to unitization. But FEA did not carry the analysis to its logical conclusion. Instead, FEA announced that "Ruling 1975-15 is rescinded *ab initio* insofar as it requires producers of unitized properties to total all the BPCL's of the participating leases and to treat the unit as a single property, before such time as there has been a significant alteration in pre-unitized producing pattern of the individual leases." *Id.* at 4937. The agency further explained that "[o]nce enhanced recovery operations begin, the producer will be required to calculate a unitized BPCL, as set forth in new 10 CFR 212.75 below, and to treat the unit as a distinct property." *Id.*

The "new 10 CFR 212.75" to which FEA referred was promulgated simultaneously with the partial rescission of Ruling 1975-15. It made explicit that unitized fields would be permitted to continue lease-by-lease accounting until "the date production patterns with respect to individual leases . . . are substantially altered." *Id.* at

4941.[11] The concept of a significant or substantial alteration in producing patterns was new to the regulatory scheme. FEA did not explain what it meant, or how it had been derived from the regulatory definition of "property," or why it would not also discourage enhanced recovery. The agency stated only that it would clarify the new concept in a later ruling. *Id.* at 4937.

Thus, as of February 1, 1976, Ruling 1975-15's rigid *per se* requirement that a unit BPCL be adopted immediately upon unitization had become a nullity. It had been repudiated as an interpretation of the regulations because it was inconsistent with an essential regulatory purpose. It was formally replaced as governing law, *ab initio*, by the generic rule that adoption of a unit BPCL could be postponed until the occurrence of a significant or substantial alteration in producing patterns.

c. *In May, 1976, FEA determines that continued lease-by-lease accounting at Hawkins Field is proper under the standard of "significant alteration in producing patterns."* Following the agency's partial rescission of Ruling 1975-15, FEA conducted an audit of Exxon, including production at Hawkins Field, and issued an audit review report in May, 1976. R. 28264. The report concluded that lease-by-lease accounting for the field's production remained proper under the standard of significant or substantial alteration in producing patterns. R. 28266, 28268.

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[11] Alternatively, the regulation required adoption of a unit BPCL upon the "implementation of enhanced recovery operations," which was defined as a method "of recovering crude oil in which part of the energy employed to move the crude oil through the reservoir is applied from extraneous sources . . . ." 41 Fed. Reg. at 4941. (That provision was deleted effective September 1, 1976.) The mere recycling of natural gas at Hawkins Field, unlike the subsequent manufacture and injection of inert gas, did not "move the crude oil through the reservoir" and thus did not constitute "enhanced recovery operations." R. 13672-80, 9861-62, 10438-42. Moreover, when the agency later defined "enhanced recovery" in greater detail, it made explicit that gas recycling was not enhanced recovery. *See* 10 C.F.R. § 212.78(c) (1979).

d. *In August, 1976, FEA defines "significant alteration in producing patterns" as either the injection of gas or an increase in allowables (regardless whether producing patterns actually had changed) but grants to unitized fields the ameliorative benefit of "imputed new oil."* In late August, 1976, FEA amended 10 C.F.R. § 212.75 effective September 1, 1976, to define "significant alteration in producing patterns" to mean "the occurrence of either (1) the application of extraneous energy sources by the injection of liquids or gases into the reservoir, or (2) the increase of production allowables for any property that constitutes the unitized property." 41 Fed. Reg. 36172, 36184 (1976). This arbitrary definition, which even covered situations where there had been no change in producing patterns at all, caught both the industry and personnel within the agency by surprise. R. 30101.[12]

The first prong of the definition arguably required adoption of a unit BPCL immediately upon any injection of gas even if, as at Hawkins Field prior to March, 1977, such injection were merely part of a continuing recycling project that had no effect on producing patterns. The second prong of the definition was even harsher: it appeared to require adoption of a unit BPCL immediately upon unitization in any field governed by state MER rules, for under such rules production allowables are continuously shifting by operation of state law irrespective of unitization. *See* note 5, *supra.*

On the other hand, the harshness of the approach embodied in the new definition was softened by a major mitigation. Along with the new definition FEA added to § 212.75 a provision allowing any "producer of crude oil from a unitized property" to report "imputed new oil" equal to the volume of new oil produced and sold during

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[12] As one lawyer employed by the agency stated at his deposition, "the reaction was that you had what appeared to be a fairly broad, vague term, significant alteration of producing patterns, and an extremely explicit definition [that] would seem not to fit in exactly with the terminology. It wasn't the kind of definition I think that the auditors expected." R. 17728.

the 12 month period immediately preceding adoption of a unit BPCL. 10 C.F.R. § 212.75(b), (d) (1977). This provision removed the disincentive to unitization otherwise associated with the requirement of a unit BPCL, for it "ensured that once a unit BPCL has been established there will be no decrease in absolute volumes of new crude oil." 41 Fed. Reg. at 36182. Thus, the new definition of "significant alteration in producing patterns" and the new benefit of "imputed new oil," taken together, did what the agency's various constructions of the regulations theretofore had failed to do—conform the requirement of a unit BPCL to the regulatory objective of increased production.

Exxon determined that the new definition required the adoption of a unit BPCL at Hawkins Field. R. 30109. But because the new definition was set forth as a new regulatory amendment and was not made retroactive, Exxon believed that it required such adoption only as of its effective date. R. 30109-10, 30115. Exxon conferred with FEA's Assistant General Counsel for Pricing, who "confirmed that this interpretation is reasonable." R. 30115. *See also* R. 5549. Consequently, Exxon adopted a unit BPCL as of September 1, 1976, and calculated "imputed new oil" based upon production from the unit during the preceding 12 months.

e. *In January, 1977, FEA announces that (1) the standard of "significant alteration in producing patterns" will be applied only as of September 1, 1976, to units formed on or after February 1, 1976, but will be applied retroactively, with the August, 1976, definition being used "as guidance," to units formed before February 1, 1976, (2) the benefit of "imputed new oil" will be denied to all units required to adopt a unit BPCL before September 1, 1976, but (3) operators of units formed before February 1, 1976, will be afforded an opportunity, on a case-by-case basis, to establish a reasonable alternative date for adopting a unit BPCL.* If matters had rested with the amendments to 10 C.F.R. § 212.75 in August, 1976, this case never would have arisen. But FEA reversed

direction again in January, 1977, when it issued new rules in the form of "interpretations." In Ruling 1977-2, 42 Fed. Reg. 4409 (1977), FEA "interpreted" its regulations as treating units formed before February 1, 1976, much less favorably than units formed on or after that date. The agency stated that units formed on or after February 1, 1976, would not be subject to the standard of "significant alteration in producing patterns" until September 1, 1976. *Id.* at 4415. In contrast, FEA stated that units formed before February 1, 1976, had been required to abandon lease-by-lease accounting and adopt a unit BPCL whenever "significant changes in the unit's producing patterns occurred," *id.*, even if those changes had taken place before the agency had first articulated the standard of "significant alteration in producing patterns."

If FEA simply had stopped there, Ruling 1977-2 would have had no apparent adverse effect at Hawkins Field—enhanced recovery did not begin at the field until March, 1977, and until that time, as FEA had recognized in its audit of Exxon, there would be no need to adopt a unit BPCL under the generic standard of "significant alteration in producing patterns." But FEA did not stop there. Instead, it went on to state:

> Although a regulatory definition of "significant alteration in producing patterns" was not provided until September 1, 1976, that definition will be considered as guidance in audits and compliance cases in determining whether a significant alteration has occurred with respect to such units [formed before February 1, 1976].

Id. The agency did not explain what it meant by the retroactive use of the August, 1976, definition "as guidance." But rigid retroactive application of that definition arguably required adoption of a unit BPCL at Hawkins Field immediately upon unitization—precisely the result that the agency itself had rejected just one year earlier when it rescinded the relevant portion of Ruling 1975-15.

Even so, if FEA had stopped there the consequences for Hawkins Field, although severe, would not have been catastrophic. Under the provision of § 212.75 allowing the reporting of "imputed new oil," the interest owners would have been permitted to continue to sell at new oil prices at least the amount of new oil produced during the 12 months preceding adoption of a unit BPCL, which for Hawkins Field in 1974 had been 34 percent of the field's total production. But FEA proceeded in Ruling 1977-2 to characterize that provision in a manner calculated to deny the interest owners at Hawkins Field even that consolation. Without any explanation, FEA announced that the ameliorative benefit of "imputed new oil" was available only to "unit BPCL's established on or after [September 1, 1976]," *id.* at 4414, even though neither the regulatory text nor the accompanying preamble had contained any such restriction.

FEA apparently recognized that this package of purported interpretations discriminated harshly against units (such as the Hawkins Field unit) formed before February 1, 1976. Presumably for that reason, FEA further announced that it would, "on a case-by-case basis, permit unit operators to justify the establishment of the date of significant alteration in producing patterns in such units on reasonable bases other than those specified by the present definition." 42 Fed. Reg. at 4415.[13]

f. *In January, 1978, DOE takes the position that a unit BPCL should have been adopted at Hawkins Field by June, 1975.* After the issuance of Ruling 1977-2, the agency followed the unusual procedure of conducting a second audit of Hawkins Field. R. 22341. At its conclusion, the Department of Energy ("DOE"), which had succeeded to FEA's functions, instituted an administra-

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[13] If nothing else, Ruling 1977-2 confirmed the admission made to Congress by FEA's Deputy Administrator that the meaning of the "property" definition "was not even clear to the regulatory agency itself." *Hearings on Crude Oil Pricing Compliance Problems Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 103 (1976).

tive enforcement action against Exxon by issuing a notice of probable violation ("NOPV"), which asserted that there had been a "significant alteration in producing patterns" not later than June, 1975, and that Exxon had violated the regulations by not adopting a unit BPCL as of that date. R. 29802-03. In response, Exxon contended, *inter alia*, that it had not been required to adopt a unit BPCL prior to September 1, 1976, and that a more reasonable date for marking the occurrence of a "significant alteration in producing patterns" was March, 1977, when enhanced recovery operations began with the manufacture and injection of inert gas. R. 32649-50.

The agency never responded to Exxon's suggestion that March, 1977, was a reasonable alternative date for adopting a unit BPCL. No administrative hearing or inquiry into that issue was undertaken, and none has occurred to this day. The agency simply ignored its own Ruling 1977-2, which granted unit operators the right to submit evidence, on a case-by-case basis, to justify a reasonable alternative date. Instead, in June, 1978, DOE withdrew the NOPV and caused this action to be instituted in the United States District Court for the District of Columbia pursuant to section 209 of the Economic Stabilization Act of 1970 ("ESA"), *as amended*, 12 U.S.C.A. § 1904 note (1980).[14]

4. *The district court's opinion.* The district court, without conducting a trial on any issue, entered summary judgment against Exxon in the amount of $1,635,604,638.10, plus post-judgment interest. App. 4a n.3.

a. *The district court applies the August, 1976, definition retroactively as a binding legal rule and holds that it required adoption of a unit BPCL at Hawkins Field on January 1, 1975.* The district court gave retroactive application to the August, 1976, definition of "significant

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[14] The district court's jurisdiction rested on section 211(a) of the ESA, as incorporated by section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, 633.

alteration in producing patterns" not merely "as guidance" but with the full force and effect of a binding legal rule. The court concluded that "under either prong of the regulatory definition—an increase in production allowables at any constituent property, or gas injection—a significant alteration in producing patterns occurred at the Hawkins Field on January 1, 1975." App. 231a. By applying that definition retroactively, the court sidestepped the necessity of conducting a trial to resolve disputed questions of fact implicated by the generic standard of "significant alteration in producing patterns" that the agency had announced in February, 1976.[15]

b. *The court approves both the selectively retroactive application of the August, 1976, definition and the denial to Exxon of the benefit of "imputed new oil."* The district court brushed aside Exxon's objections that application of the August, 1976, definition contained in 10 C.F.R. § 212.75 was both retroactive and discriminatory. The court asserted that Exxon "suffered no injury from retroactive application . . . because [the new interpretation] . . . was less stringent than the rule it replaced." App. 213a. In reaching this conclusion, the court apparently assumed that the rule "replaced" by the August, 1976, definition was the rigid *per se* requirement of Ruling 1975-15. But Ruling 1975-15 had been repudiated

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[15] All fourteen petroleum engineering experts deposed by the parties, including DOE's own expert, had testified that there had been no significant alteration in producing patterns at Hawkins Field until March, 1977, when enhanced recovery began with the manufacture and injection of inert gas. R. 29517-39. At their depositions, the expert witnesses had testified, *inter alia*, that the recycling of natural gas and the shutting in of incapable wells during 1975 and 1976 had made no appreciable difference in the field's producing patterns and that, until the manufacture and injection of inert gas began in March, 1977, the pattern of production had remained virtually the same as it would have been in the absence of unitization. *E.g.*, R. 10426-27, 2977-78, 9858-59, 17246-47, 14815-16. Their testimony further established that Exxon, as the operator of Hawkins Field, had followed sound conservation practices and had not sought to maximize the production of new oil. *E.g.*, R. 23165, 23250, 23278-79.

and rescinded by the agency *ab initio*, with the consequence that it had been stripped of its authority as a valid interpretation of the regulations. The rescission of Ruling 1975-15 explicitly permitted a producer, after unitization, "to postpone establishing a unit BPCL and to continue lease-by-lease accounting until production patterns had been significantly altered, perhaps months or even years later." *Id.* Thus, the pre-existing rule actually was substantially less stringent than the August, 1976, definition, which required adoption of a unit BPCL upon an injection of gas or increase in allowables, whether or not there had been any change in producing patterns.

The district court acknowledged that the August, 1976, definition was being applied retroactively to units formed before February 1, 1976, but only prospectively, from and after September 1, 1976, to units formed on or after February 1, 1976. App. 215a-217a. The court reasoned, however, that such disparity in treatment was not unlawfully discriminatory because those two categories of units were "not similarly situated." *Id.* But the agency itself had announced that units formed before and after February 1, 1976, were subject to the same legal standard of significant or substantial alteration in producing patterns. *See* 41 Fed. Reg. at 4937, 4941. Such units therefore were similarly situated—until the agency announced in Ruling 1977-2, after the fact, that it intended to treat them differently.

The district court further approved FEA's determination to deny the benefit of the provision for "imputed new oil" in § 212.75 to units that were required to adopt unit BPCLs prior to September 1, 1976. The court made no effort whatsoever to square that determination with the language of the regulation itself. The court acknowledged, moreover, that the denial of the benefit of "imputed new oil" constituted yet another selective discrimination against Hawkins Field because other units formed before September 1, 1976, were granted that benefit. App. 218a-219a n.35. The court conceded that the dis-

crimination might be irrational but held that it was enforceable nonetheless. *Id.* This irrational denial of the benefit of "imputed new oil" roughly doubled Exxon's liability.

c. *The court refuses to consider the question of a reasonable alternative date for adopting a unit BPCL.* Having determined that the August, 1976, definition, retroactively applied, required adoption of a unit BPCL immediately upon unitization at Hawkins Field, the district court upheld the agency's refusal, without any hearing or inquiry, to permit Exxon to establish a reasonable alternative date—a procedure expressly promised by the agency in Ruling 1977-2. The court also refused to consider any reasonable alternative date itself. Although Exxon had sought to establish such a date in its response to the agency's NOPV, and had raised the matter again in its pleadings in court, the court flatly stated that "the question of what might be a reasonable alternative basis to justify the establishment of the date of significant alteration is not before the court." App. 226a n.38.[16]

d. *Under a statute that allows only "restitution of moneys received," the court orders Exxon to pay, with prejudgment interest, amounts that it never received to persons who suffered no harm.* The district court further held that, even though Exxon was the buyer rather than the seller of almost one-third of the field's production, because "Exxon was the prime mover and animating force behind the formation and operation of the Hawkins Field Unit . . ., Exxon may be held responsible for all overcharges at the field." App. 240a.[17] Instead of under-

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[16] The court further observed that it would not be reasonable to look solely at "changes in the field's underground drive mechanism." App. 226a n.38. But the court did not respond to Exxon's basic argument that producing patterns had not been significantly altered until the initiation of enhanced recovery in March, 1977—a process characterized by the above-ground phenomena of manufacturing and injecting inert gas.

[17] It has never been determined that any consumer of petroleum products actually was "overcharged." Exxon was "overcharged,"

taking to determine who, if anyone, had been injured by the purported "overcharges," the court simply ordered Exxon to make payment to the several States pursuant to an allocation formula. *See* App. 254a-257a. The court further assessed prejudgment interest "based on an average of prime rate values." App. 259a.[18]

5. *TECA's opinion.* The court of appeals affirmed "in all respects." App. 92a.

a. *TECA holds that the definition of "property" in 10 C.F.R. § 212.72 required adoption of a unit BPCL immediately upon unitization in every case, notwithstanding FEA's explicit determination to the contrary when it rescinded Ruling 1975-15 ab initio.* Apparently as a way of avoiding issues of fact and problems of retroactivity and discrimination, TECA stated that the case really was very simple: the mere definition of "property" in 10 C.F.R. § 212.72 ("the right which arises from a lease or from a fee interest to produce domestic crude oil") had "required the establishment of a single BPCL upon unitization of the Hawkins Field." App. 29a. Thus, the case came back full circle to the regulatory

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by the lower courts' reckoning, when it bought crude oil from other interest owners, and to some extent the new oil price was spread among other refiners through the mechanism of the "entitlements program." *See* 10 C.F.R. § 211.66 *et seq.* (1981). It has never been determined, however, that Exxon or any other refiner passed such "overcharges" through to consumers in the prices of refined petroleum products.

[18] The court purported to follow "the schedule of interest rates [DOE] has applied in administrative enforcement actions since February 1980." App. 259a. In fact, that schedule is applied in administrative proceedings only prospectively from and after either April 10, 1981 (the date of its adoption) or the point in the proceedings when enforcement officials request its application, whichever is later. *E.g., Texas Pacific Oil Co.*, 12 DOE ¶ 83,020 at 86,262 (1984); *MGHC, Inc.*, 10 DOE ¶ 83,021 at 86,226 (1983). The government in this case did not request application of the new schedule until August 27, 1982, *see* R. 23537, yet the district court applied the schedule retroactively to January 1, 1975. The court's retroactive application of the schedule increased Exxon's liability by more than $250 million. R. 31476-77, 31490, 31654.

interpretation that had been suggested by the agency in Ruling 1975-15. But FEA had flatly repudiated that interpretation when it rescinded Ruling 1975-15 *ab initio* in February, 1976. FEA had done so, moreover, specifically because that interpretation was inconsistent with the regulatory objective of increasing oil production through enhanced recovery—an objective that had been furthered, at substantial private expense, by the interest owners at Hawkins Field.

b. *TECA holds in the alternative that the district court was correct in applying the August, 1976, definition and in denying the benefit of "imputed new oil."* Quoting extensively from the district court's opinion, the court of appeals further held that application of the August, 1976, definition to Hawkins Field was not impermissibly retroactive or discriminatory. App. 35a-43a. To give that holding plausibility, TECA resorted to invention, stating that Exxon's "decision to unitize and to account upon a lease-by-lease basis was made in 1974, with full knowledge that Section 212.72 . . . required unit wide accounting upon unitization." *Id.* at 39a. That statement could not properly be made on summary judgment and in fact was incorrect. *See* pages 4-7, *supra*. Further, TECA wrongly brushed aside as "after the fact speculation," App. 40a, Exxon's contention that it and the other interest owners would not have signed a unit agreement if they had known that a unit BPCL would have been required upon unitization—a contention supported both by uncontroverted testimony, *e.g.*, R. 17384-86, 13370-71, 16179-82, and by documents prepared before the unit agreement was signed, *e.g.*, R. 29832, 29834-37, 29839-45.

TECA also approved the denial of the benefit of "imputed new oil" to Hawkins Field. Like the district court, TECA ignored the regulatory text, which makes that benefit available without regard to when a unit is formed

or a unit BPCL adopted.[19] Instead of applying the regulation as it was written, the court announced that "the agency need not give the benefits of Section 212.75 to . . . pre-existing units." App. 42a.[20]

c. *TECA "affirms" a purported holding by the district court that Exxon had failed to establish a reasonable alternative date.* Although the district court had refused even to consider Exxon's contention that March, 1977, was a reasonable alternative date for adopting a unit BPCL, *see* App. 226a-227a n.38, TECA claimed that "the trial court further determined that Exxon had failed to justify another date upon some other 'reasonable basis,' as allowed by Ruling 1977-2." App. 52a. TECA then proceeded to "affirm" that purported determination on two grounds: *first*, because "production across lease lines began in January, 1975," App. 53a, even though such shifts in production occur continuously in a field governed by state MER rules whether or not the field has been unitized; and *second*, because "any resort to the testimony of expert petroleum engineers for the purpose of determining a reasonable alternative date for a significant alteration in production methods at Hawkins Field would be unworkable," App. 54a-55a, even though Ruling 1977-2

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[19] TECA's description of § 212.75 uses a highly misleading quotation to make it appear as if the regulation by its terms applied only to units formed on or after February 1, 1976. *See* App. 10a. In fact, the regulation contained no such language. TECA was simply quoting, without attribution, from the inaccurate description of the regulation that appeared at page 9 of the government's brief.

[20] In fact, the agency in Ruling 1977-2 had acted to deny the newly created benefit of "imputed new oil" only to some, not to all, pre-existing units. Units formed before February 1, 1976, were entitled to "imputed new oil" if they had not experienced a "significant alteration in producing patterns" before September 1, 1976, and units formed on or after February 1, 1976, were granted the benefit even if they had experienced a "significant alteration in producing patterns" before September 1, 1976. *See* 42 Fed. Reg. at 4414-15.

explicitly called for such determinations to be made "on a case-by-case basis," 42 Fed. Reg. at 4415.[21] Thus, TECA not only approved the agency's departure from its own procedures but denied Exxon any comparable judicial remedy as well.

d. *TECA upholds the imposition of liability for "overcharges" committed by other interest owners, the award of excessive prejudgment interest, and the selection of the several States as the recipients of "restitution."* Like the district court, the court of appeals made no real attempt at balancing the equities. Instead, TECA administered the equitable standard of "restitution of moneys received" under section 209 of the ESA as if it were a nondiscretionary command to award damages. TECA determined that, in the interest of administrative convenience, Exxon as the operator of the unit should be held liable for all overcharges occurring at Hawkins Field. App. 55a-61a.[22]

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[21] TECA further justified its decision by asserting that "Exxon admitted that gas injection at the Hawkins Field Unit was an enhanced recovery operation." App. 51a. That was factually incorrect. The documents on which TECA relied explicitly distinguished between the recycling of gas and the injection of inert gas and identified only the latter, which did not begin until March, 1977, as enhanced recovery. *See, e.g.*, R. 13678-80, 24365, 24681.

[22] TECA strained to find that Exxon had "caused" all overcharges. For example, the court reasoned as follows that Exxon had caused Texaco to commit overcharges:

> Because Exxon was pricing other oil from the field upon a lease basis, it was paying larger royalties than Texaco for "new oil." As a result, some royalty owners threatened to sue Texaco. This caused Texaco to adopt Exxon's method of calculation . . . .

App. 62a. On that basis, Exxon was held liable for more than $100 million in overcharges and interest attributable to crude oil owned and sold or refined by Texaco. *See* R. 31473, 31490. In addition, TECA held Exxon liable even for alleged "overcharges" attributable to crude oil owned and sold by interest owners who had entered into settlements with DOE covering those "overcharges." *See* App. 67a-71a.

In its zeal, TECA even affirmed a holding that Exxon must pay approximately $500,000, including prejudgment interest, with re-

Then, apparently forgetting that Exxon was being held liable for hundreds of millions of dollars attributable to crude oil produced and sold by other interest owners—crude oil that Exxon actually had purchased and with respect to which Exxon itself had paid the "overcharges"—TECA approved the award of prejudgment interest as a means of depriving Exxon of "the benefits Exxon obtained by having the use over the years of the money illegally obtained." App. 71a. TECA concluded by approving the selection of the several States as the recipients of "restitution" on the theory that they represented the consuming public, whom TECA simply assumed had been injured.[23]

REASONS FOR GRANTING THE PETITION

The judgment which we ask this Court to review violates the most fundamental canon of Anglo-American administrative law: the principle that when government seeks to apply coercive force to interfere with a citizen's liberty or property, it do so on the basis of law, *i.e.*, on the basis of general and knowable rules and standards that are consistent with the statutory purpose and that have been formulated and articulated in advance with sufficient coherence and clarity to assure that the citizen is not being singled out retroactively for *ad hoc* discrimi-

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spect to production that not even the government claims was wrongly priced (production owned by third persons whose interests were not included in the unit). This amount had been mistakenly included by the government in the figures it submitted to the district court, and Exxon had asked the district court to eliminate it from the calculation of liability. R. 31448-49. For reasons of its own, the government refused to acknowledge its error, and TECA gave the issue the back of its hand, incorrectly asserting, without further explanation, that "this new argument, presented by a footnote to the Exxon [appellate] brief, was not properly raised or preserved for our review on appeal." App. 66a-67a.

[23] One member of the panel dissented on the ground that there should have been a trial "to identify the victims of the illegal overcharges or the amounts of the damages suffered by each victim or groups [*sic*] of victims." App. 94a.

natory punishment. This principle lies at the heart of due process.

The decision below "is an ominous one to those who believe that men should be governed by laws that they may ascertain and abide by." *Securities and Exchange Commission v. Chenery*, 332 U.S. 194, 211 (1947) (Jackson, J., dissenting). It is lawless, in the most literal sense, for government to create an uncertain, constantly shifting, and incoherent crazy-quilt of regulatory prescriptions—ones from which it is impossible to derive an understandable legal standard—and then, later, to pick and choose among the kaleidoscope of potential rules that have thus been put into play in order retroactively to manufacture the most punitive possible solution. This Court has no task more noble or significant than to demonstrate that the principle of legality is fundamental and may not be skirted and elided in order to visit punishment, whether on the most humble person or the largest corporation in the land. *Cf. Thompson v. Louisville*, 362 U.S. 199 (1960); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973).

The most striking aspect of this case is the way in which the regular norms of the legal system were, again and again, brushed aside or bent by the agency and lower courts in order to single out Exxon for the imposition of a staggering punitive liability. Symptomatic of this approach (and these are only examples) are (i) TECA's application to Exxon of a regulatory interpretation that the agency itself had formally repudiated as inimical to the purposes of the regulatory enterprise; (ii) the lower courts' eagerness to apply FEA's onerous August, 1976, definition retroactively to conduct occurring long before its promulgation, while at the same time refusing to allow Exxon the ameliorative benefit that the agency itself had designed to mitigate the harshness of that definition; (iii) the lower courts' uncritical acceptance of the irrational and bizarre discriminations created by the agency's Ruling 1977-2; (iv) the lower courts' unexplained refusal to make the agency comply with its own

announced rule that it would, on a case-by-case basis, give firms an opportunity to be heard with respect to a "reasonable" alternative date; and (v) the lower courts' high-handedness on virtually every aspect of the matter of remedy.

TECA threaded its way through the regulatory scheme, picking and choosing among the agency's pronouncements, taking those most damaging to Exxon (no matter how arbitrary, unfair, and textually unjustified) and rejecting those favorable to Exxon (no mater how reasonable and firmly rooted in administrative practice). The court similarly threaded its way through the record, making only those inferences and selecting and finding only those facts (even though disputed) that supported the government, in violation of the basic principles that govern summary judgment practice under Fed. R. Civ. P. 56. *See, e.g., Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). Charged with the duty of enforcing the equitable remedy of restitution, the court imposed the severest possible monetary liability. The resulting judgment—that Exxon is liable for more than two billion dollars for achieving precisely the increase in crude oil production that the agency had sought to encourage—represents a fundamental miscarriage of justice, one so extreme as to constitute a denial of due process.

The judgment also represents a blithe disregard for many of the fundamental rules of administrative law that have been developed by this Court as necessary elements of legality and regularity—rules binding agencies to follow their own announced regulations; rules ensuring that retroactive liabilities may be imposed only on the basis of standards foreshadowed by common-law-style developments and only where they are justified by serious administrative necessities; rules imposing canons of equal treatment even within areas of broad administrative discretion; rules requiring agencies to follow their own designated procedures; rules insisting that remedies have a rational nexus with the underlying substantive findings. These rules all have as their unifying premise the central

principle that every citizen is entitled, as of right, to treatment in the regular course of law under general standards applicable to all and knowable in advance. It is in order to reaffirm the primacy of these rules—in order to insist that not even one of the largest corporations in the land may be singled out for *ad hoc* retroactive and discriminatory punishment—that we ask this Court to review.[24]

1. *TECA fundamentally erred in adopting a construction of 10 C.F.R. § 212.72 that had been repudiated by the agency as substantively invalid.* At the time Hawkins Field was unitized, the crucial regulatory term "property" was defined by 10 C.F.R. § 212.72 as "the right which arises from a lease or from a fee interest to produce domestic crude oil." There was nothing in either the text of the regulation or in the regulatory preamble to indicate when, if ever, a unit would be required to be treated as a property.[25] It therefore would be perfectly reasonable to read the regulation as permitting leases to continue to be treated as properties without regard either to unitization or to events subsequent to unitization. In-

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[24] It is particularly important to affirm that these rules have primacy in litigation before TECA. For nearly a decade, commentators have criticized TECA for one-sidedness and for "show[ing] little concern for 'principled fairness.'" Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 DUKE L. J. 113, 151. *See also* Burke, *Report to ABA Economic and Resources Controls Committee on Economic Stabilization Program Litigation*, 32 BUS. LAW. 1259, 1286 (1977). TECA's perceived failure to adjudicate fairly has become widely recognized. *See* American Bar Association, Administrative Law Section, *Recommendations and Report to the House of Delegates, American Bar Association: Report on Appellate Review for Emergency Programs* 11 (1984). Our own review indicates that in its fifteen years of existence TECA has never reversed a civil judgment in the agency's favor on the merits of a regulatory issue and that it has ruled in the agency's favor in approximately 90 percent of all appeals.

[25] As the agency has acknowledged, "[t]here was no discussion of the term property in the preamble to the final regulations." 42 Fed. Reg. 3628, 3630 (1977).

deed, this is the only construction that appears textually justified.

FEA, of course, gave the regulation a different reading. In Ruling 1975-15, the agency's first public pronouncement on the issue, FEA construed § 212.72 as requiring a unit to be treated as a property immediately upon unitization. But a few months later, when FEA realized that such a construction would defeat an important regulatory objective—that of encouraging the increased production of domestic crude oil through the implementation of enhanced recovery techniques—it construed the regulation as requiring a unit to be treated as a property only at "such time as there has been a significant alteration in pre-unitized producing patterns of the individual leases." 41 Fed. Reg. at 4937.[26]

Confronted with the plain meaning of the regulatory text and the formally announced (albeit different) administrative interpretation, TECA chose neither. Instead, the court went on an inexplicable frolic of its own, construing the regulation as requiring a unit to be treated as a property immediately upon unitization—precisely the interpretation that FEA had explicity repudiated as substantively invalid in rescinding the relevant portion of Ruling 1975-15 *ab initio*.[27]

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[26] This official interpretation obviously takes precedence over the later *post hoc* rationalizations of the agency's litigation attorneys, who in this case argue that § 212.72 required adoption of a unit BPCL upon unitization. *See, e.g., Securities Industry Ass'n v. Board of Governors*, 104 S. Ct. 2979, 2983 (1984).

[27] FEA had not just explicitly repudiated the construction TECA chose to give to the regulation. On at least five separate occasions before September 1, 1976, FEA had explicitly stated that units were permitted, if not required, to continue lease-by-lease accounting after unitization: (1) FEA's informal advice to producers, such as Austral Oil Company and Pennzoil Company, *see* page 6, *supra*; (2) the decisions by FEA's Office of Exceptions and Appeals in *Empire Drilling* and *Sun Oil*, *see* note 10, *supra*; (3) the advice given to Exxon by FEA's General Counsel, *see* page 9, *supra*; (4) FEA's audit of Exxon, *see* page 11, *supra*; (5) the advice given to Exxon by FEA's Assistant General Counsel for Pricing, *see* page

This Court repeatedly has taught that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). *See also, e.g., United States v. Larionoff*, 431 U.S. 864, 872-73 (1977). It was flagrant error for TECA to depart from both "the plain words of the regulation and [the] relevant interpretations of the Administrator," *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. at 414, and to insist upon its own idiosyncratic reading of § 212.72. TECA could not lawfully impose on Exxon as "law" a standard that had been rescinded and repudiated and that therefore did not exist as "law." TECA's decision in this regard constitutes a blatant departure from the fundamental principle of legality that lies at the heart of due process.

2. *TECA's retroactive and discriminatory application of 10 C.F.R. § 212.75 violates three important principles of administrative due process established by the decisions of this Court.*

a. *TECA's interpretation of the new regulatory definition as having retroactive effect violates this Court's "first rule of construction."* When FEA amended 10 C.F.R. § 212.75 in August, 1976, to add a new and restrictive definition of "significant alteration in producing patterns," it gave no hint that the new definition was to be applied retroactively. The amendment was made "effective September 1, 1976," 41 Fed. Reg. at 36184, and neither the regulatory text nor the preamble suggested that the new definition would operate so as to require adoption of a unit BPCL before the effective date. Nevertheless, the district court and TECA, without explana-

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13, *supra*. By construing the regulation differently in 1985 (and by wrongly claiming that Exxon knew all the time what was required by the regulation as so construed), TECA was holding Exxon to a far higher standard of knowledge of the regulations than FEA itself could have met.

tion, applied the new definition retroactively as a binding rule of law.[28]

It was plain error to construe the August, 1976, definition as having retroactive effect. As this Court has explained,

> the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

Greene v. United States, 376 U.S. 149, 160 (1964) (footnote omitted). Retroactive application of the August, 1976, definition interfered with antecedent rights; by its terms the definition was not retroactive; and at the time of promulgation the agency manifested no intention to make it retroactive. "An administrative regulation is subject to the rule equally with a statute; and accordingly, the regulation here involved must be taken to operate prospectively only." *Miller v. United States*, 294 U.S. 435, 439 (1935).

b. *TECA's retroactive application of the August, 1976, definition violates established principles of due process.* A new rule cannot be applied retroactively "to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways." *Lewellyn v. Frick*, 268 U.S. 238, 252 (1925). Yet, this is precisely what the lower courts did. They construed the August, 1976, definition as retroac-

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[28] In Ruling 1977-2, FEA had indicated that for earlier periods the definition was to be used only "as guidance," not as a binding rule of law. 42 Fed. Reg. at 4415. The district court, however, explicitly applied the new definition retroactively as a binding rule. *See* App. 231a. TECA acknowledged that "the argument is made that . . . the agency intended that the Section 212.75 definition of substantial [*sic*] alteration be used only as 'guidance,'" App. 44a, but then proceeded to apply the definition retroactively as a binding rule anyway. *See* App. 45a-51a.

tively requiring the operator of a unit to adopt a unit BPCL upon the occurrence of events—the injection of gas and an increase in allowables—that were occurring continuously at Hawkins Field even before unitization. If the interest owners at Hawkins Field had known in 1974 that such a regulation would be promulgated in August, 1976, and applied retroactively to require the adoption of a unit BPCL immediately upon unitization in January, 1975, they would not have unitized; they would not have spent more than $220 million in order to increase the production of crude oil through enhanced recovery.

Retroactive application has the effect of substantially reducing, after the fact, the volume of crude oil that qualified for the higher new oil price. It converts new oil into old oil after the fact, making prices that had been lawful when charged unlawful retroactively. That result conflicts with this Court's decision in *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370 (1932). That case stands for the proposition that rate orders cannot be amended retroactively in a manner that renders unlawful prices that had been lawful when charged. The agency "could repeal the order as it affected future action, and substitute a new [prospective] rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself." *Id.* at 389.[29]

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[29] Only last year, this Court reaffirmed that "an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests." *Heckler v. Community Health Services Inc.*, 104 S. Ct. 2218, 2224 n.12 (1984). When they entered into the unit agreement, the interest owners relied upon the determination of their rights under existing law, which they reasonably construed as permitting the continuation of lease-by-lease accounting. The retroactive application of a new regulation that foreclosed that possibility unquestionably constituted an undue intrusion—one that cannot be squared with traditional notions of due process. *See, e.g., Central Illinois Public Service Co. v. United States*, 435 U.S. 21, 32 (1978); *Forbes*

To be sure, due process does not bar all retroactivity. But to be lawful, retroactive application must be "justified by a rational legislative purpose." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 104 S. Ct. 2709, 2718 (1984). No such purpose is served by retroactive application of the August, 1976, definition. Retroactivity simply imposes horrendous, pointless, and unfair liability. "[T]here can be no constitutional justification for arbitrarily imposing millions of dollars of additional liabilities . . . in respect of transactions long closed." *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 354 (1935).[30] To the extent that the August, 1976, definition operates as a retroactive rule, therefore, it is arbitrary and capricious and unenforceable both under the Administrative Procedure Act, 5 U.S.C. § 706 (2), and under the Due Process Clause of the Fifth Amendment.

c. *TECA's selective application of § 212.75 violates this Court's teaching concerning the invalidity of arbitrary and discriminatory classifications.* Ruling 1977-2

Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338, 339-40 (1922).

The government can be expected to argue that retroactive application of the August, 1976, definition should be disregarded because, it will claim, a unit BPCL was required at Hawkins Field as of January 1, 1975, even under the generic standard of "significant alteration in producing patterns" announced in February, 1976. That argument, however, has two fatal flaws. *First*, it also relies upon retroactivity—retroactive application of the generic standard. *Second*, even apart from any question of retroactivity, application of the generic standard involves the resolution of disputed questions of fact. *See, e.g.*, note 15, *supra*. Those questions were not and could not have been decided in this case on summary judgment.

[30] Even if some plausible rational basis could be invented, moreover, none was ever articulated by the agency. Indeed, the agency itself stopped short of calling for retroactive application; retroactivity is a construct of the courts below. In any event, the courts "may not supply a reasoned basis . . . that the agency itself has not given." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

harshly discriminated against the unit at Hawkins Field. According to that Ruling, in August, 1976, when FEA created a valuable benefit for unitized properties in the form of "imputed new oil," it doled out that benefit to pre-existing units in a very strange manner: units formed before February 1, 1976, received the benefit only if they had not experienced a "significant alteration in producing patterns" before that standard was defined on September 1, 1976; but units that had been formed on or after February 1, 1976, received the benefit without regard to whether or when they had experienced a "significant alteration in producing patterns."

Thus, in August, 1976 (although nothing in the regulatory text or preamble suggested it), the agency was allocating the benefit of "imputed new oil" among units on the purely fortuitous basis of when they had been formed in the past. This is no small matter. Approximately one-half of Exxon's liability in this case derives from the denial of "imputed new oil."

There is utterly no rational basis for FEA's discriminatory treatment of units like that at Hawkins Field. It was the responsibility of the agency to "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. at 43. FEA did not do so. The only explanation ever offered by the agency was that units formed on or after February 1, 1976, were uniquely deserving of a grace period—a grace period that, incidentally, resulted in their additionally being entitled to "imputed new oil"—because "§ 212.75 did not, until September 1, 1976, contain a definition of 'significant alteration in producing patterns.'" 42 Fed. Reg. at 4415. That explanation is obvious nonsense. According to FEA, until September 1, 1976, all units, whenever formed, had been subject to the same standard of "significant alteration in producing patterns." *See* 41 Fed. Reg. at 4937, 4941. Thus, all units had been equally subject to the uncertainty caused by the absence of a definition and were equally deserving

of a grace period. If anything, units formed before February 1, 1976, were more deserving, for at the time they were formed the agency had not even articulated the generic standard of "significant alteration in producing patterns," let alone furnished a regulatory definition.

FEA was correct that the absence of a defined standard justified the granting of a grace period. As a matter of law, however, any such grace period had to be made available even-handedly and without favoritism. That is the teaching of this Court. A recent case in point is *Williams v. Vermont*, 105 S. Ct. 2465 (1985). There, this Court struck down a legislative classification that granted a benefit to old residents of a state but denied it to new ones, explaining that "[t]he fact that it may be rational or beneficient to spare some . . . does not mean that the beneficience can be distributed arbitrarily." *Id.* at 2474. It has long been established, moreover, that legislative classifications cannot rest upon an arbitrarily chosen historic date. For example, in *Binney v. Long*, 299 U.S. 280, 294-95 (1936), this Court invalidated a statute, enacted in 1909, that distinguished between conveyances made before, and those made after, September 1, 1907. The improper classification struck down in that case is virtually indistinguishable from the one approved by TECA here.[31]

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[31] TECA and the district court tried to rationalize FEA's discriminatory classification on the ground that it was required by the Energy Policy and Conservation Act ("EPCA"), Pub. L. No. 94-163, 89 Stat. 871. *E.g.*, App. 42a-43a. That plainly is wrong. The relevant provision of the EPCA permitted FEA to reclassify old oil as new oil in order to "give positive incentives for . . . enhanced recovery techniques." 15 U.S.C. § 757(b)(2). That is precisely what FEA did when it granted the benefit of "imputed new oil" to those units formed on or after February 1, 1976, that had experienced a significant alteration in producing patterns but had not implemented enhanced recovery before September 1, 1976. It would have been equally consistent with the EPCA for FEA to have granted the benefit of "imputed new oil" to units, like that at Hawkins Field, which although formed before February 1, 1976, also had not implemented enhanced recovery before September 1, 1976.

A regulatory classification must stand or fall on the rationale furnished by the regulatory agency. *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. at 42-43. As we have shown, the rationale furnished by FEA—that units formed on or after February 1, 1976, were uniquely deserving of a grace period—makes no sense. Consequently, the provision for "imputed new oil" should be enforced as it in fact was written and made available prospectively to all units from and after September 1, 1976, no matter when they were formed or when they were required to adopt a unit BPCL.

Indeed, the benefits of "imputed new oil" should be made available retroactively if the harsh new definition contained in § 212.75 itself is to be applied retroactively, as the lower courts have done. A unit required by the new definition to adopt a unit BPCL in January, 1975, should be entitled to "imputed new oil" from January, 1975, to September, 1976, as well as thereafter. This result can be justified not only on the ground that "what is sauce for the goose is sauce for the gander" but also because the provision for "imputed new oil" was intended, in part, to alleviate the harshness of the new definition. *See* 41 Fed. Reg. at 36182. To apply the new definition retroactively, but the provision for "imputed new oil" either prospectively or, as TECA has done, not at all, inordinately magnifies rather than alleviates the new definition's harshness.

3. *TECA not only approved but participated in a violation of the Accardi doctrine.* In Ruling 1977-2, which otherwise represented an extremely severe construction of the agency's regulations, FEA formally ruled that, in mitigation, it would "on a case-by-case basis, permit unit operators to justify the establishment of the date of significant alteration in producing patterns in such units on reasonable bases other than those specified by the present definition." 42 Fed. Reg. at 4415. In this case, that promise proved to be wholly illusory. Al-

though Exxon sought to present its case to the agency, neither FEA nor its successor, DOE, ever made any inquiry into or permitted Exxon to present evidence that would justify the establishment of a reasonable alternative date.

This was a flagrant violation of the doctrine, first expressly articulated in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), that an administrative agency must adhere to its own rules. That doctrine dictates that an agency "must comply, at a minimum, with its own internal procedures," *Morton v. Ruiz*, 415 U.S. 199, 235 (1974), even when those procedures are set forth only in "an internal-operations brochure intended to cover policies that 'do not relate to the public.'" *Id. A fortiori*, the doctrine requires an agency to comply with a procedure that is explicitly designed for the protection and benefit of regulated entities and has been formally announced and published in the *Federal Register*.

The promised case-by-case determination of a reasonable alternative date was an integral part of a larger regulatory package; the agency cannot lawfully insist upon a one-sided enforcement of that package, under which Exxon must rigidly adhere to the letter of Ruling 1977-2 but the agency itself need not. After all, "[i]t is not too exacting to require that [DOE] be a[s] meticulous in obeying its own rules" as it was in "prepar[ing] the groundwork for prosecution." *Yellin v. United States*, 374 U.S. 109, 124 (1963).

The lower courts did not try to cure the agency's violation of the *Accardi* doctrine. Instead, they compounded the wrong. The district court in effect pretended that the problem did not exist, wrongly claiming that "Exxon has never proffered any alternative basis to the agency . . . [and therefore] the question . . . is not before the court." App. 226a n.38.[32] Apparently not wholly

[32] The district court's handling of this issue is beyond understanding. At an earlier stage of the case, when Exxon had moved

satisfied with that result, TECA once again resorted to invention, claiming that "the trial court . . . determined that Exxon had failed to justify another date upon some other 'reasonable basis,' as allowed by Ruling 1977-2." App. 52a.

In "affirming" that purported determination, TECA held, as a matter of law, that there could be no reasonable alternative date because "production across lease lines began in January, 1975." *Id.* at 53a. The court did not explain what this meant and apparently did not recognize that, because Hawkins Field was governed by state MER rules, production allowables were shifting from lease to lease even before unitization. Certainly nothing in Ruling 1977-2 suggests that "production across lease lines" precludes the establishment of a reasonable alternative date. Ruling 1977-2 requires the evaluation of evidence on a case-by-case basis, not the application of arbitrary and preclusive rules. TECA, however, obviously thought that the factual inquiry contemplated by the Ruling would be a waste of time: "any resort to the testimony of expert petroleum engineers for the purpose of determining a reasonable alternative date . . . would be unworkable." *Id.* at 54a-55a. But resort to such testimony or evidence—a routine procedure in both administrative and judicial proceedings—would hardly be "un-

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to dismiss the government's suit so that the question of a reasonable alternative date could be determined first by DOE, the court had assured Exxon that its rights would be preserved:

> Nothing . . . indicates that the DOE will attempt to prevent the defendant from introducing evidence in support of such a date. Indeed, it would appear that any attempt by the DOE to do so would be a violation of the *Accardi* doctrine . . . . [The present suit] merely means that this court, rather than an arm of the agency, will assume the task of making findings of fact and conclusions of law.

App. 333a-334a. When the court later refused to consider the question of a reasonable alternative date, it was "like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard." *Windsor v. McVeigh*, 93 U.S. 274, 277-78 (1876).

workable." When the agency promised to scrutinize the question of a reasonable alternative date on a case-by-case basis, it surely anticipated that it would be asked to consider such evidence. The agency has admitted, furthermore, that Hawkins Field presents the only instance in which the determination of a reasonable alternative date would be necessary under Ruling 1977-2, R. 2241, 2245, 2247, so that the burden of evaluating the evidence and making the determination this one time would hardly be overwhelming.

4. *TECA erroneously construed and applied section 209 of the ESA in a manner that destroys its essential character as an equitable remedy.* Section 209 of the ESA limited Exxon's liability to "restitution of moneys received." There were numerous mitigating factors that the district court and TECA should have taken into account in applying that equitable standard. Just as examples, (1) at a time when national energy policy stressed the importance of increasing the supply of domestic crude oil, Exxon and the other interest owners at Hawkins Field, at a cost of more than $220 million, implemented an enhanced recovery project generating an additional 70 million barrels of oil; (2) the project would not have been undertaken if the agency, in 1974, had announced the legal interpretation that it in fact arrived at only in 1977; (3) in 1974, not only was the law ambiguous, but the agency informally was taking the position that Exxon's construction of the regulations was correct; (4) Exxon kept the agency fully advised of the method by which the regulations were being applied at Hawkins Field; (5) in operating the unit, Exxon made no attempt at gerrymandering to maximize production of new oil but instead adhered to sound conservation practices; (6) Exxon owned only two-thirds of the production at Hawkins Field and actually was the purchaser, not the seller, of most of the rest; (7) the government already has collected from some of the other major interest owners, through settlements between them and DOE; (8) in the absence of unitization and enhanced recovery, a sub-

stantial portion of the field's production would have qualified for the higher new oil price; (9) harshly retroactive and discriminatory application of the regulations denies Exxon the benefit of "imputed new oil" and leaves Exxon far worse off than if enhanced recovery had never been implemented; (10) it has never been determined whether or in what amount consumers were affected (indeed, in the long run they have unambiguously benefited from the increase in oil supplies).[33]

TECA, like the district court, gave these considerations short shrift. Under the guise of remedying "unjust enrichment," TECA took from Exxon that which Exxon in fact never had received. Without making any effort to balance the equities, TECA held Exxon liable for all alleged "overcharges," calculated in a purely mechanical manner, not just on the crude oil owned by Exxon but on all crude oil from Hawkins Field owned and sold or refined by others (including more than $100 million in alleged "overcharges," including interest, committed independently by Exxon's competitor Texaco). That approach squarely conflicts with this Court's teaching concerning the equitable nature of restitution. Because the "cause of action for restitution is . . . equitable in origin and function . . . to prevail [a claimant] must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it." *Atlantic Coast Line Railroad*

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[33] In addition, whether or not this Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), applies retroactively, TECA should have given weight to the fact that the amount of the alleged "overcharges" would have been much less if the House of Representatives had not unconstitutionally vetoed President Ford's order decontrolling crude oil. That order provided for phased decontrol at 3.3 percent per month over a 30-month period, *see* 40 Fed. Reg. 30030, 30035-36 (1975), but was vetoed on July 22, 1975. 121 Cong. Rec. 23,983-84 (1975). TECA cavalierly brushed this history aside, observing that "*Chadha* may not be used by the oil industry to escape the responsibilities owed to the nation and its people as represented by the law and regulations implemented by the DOE and interpreted by this Court." App. 26a.

Co. v. Florida, 295 U.S. 301, 309 (1935). Indeed, "a court of equity . . . guided by equitable doctrines and principles . . . may . . . even withhold relief altogether." *Securities and Exchange Commission v. United States Realty & Improvement Co.*, 310 U.S. 434, 455 (1940).

Here, Exxon has never been "the possessor" of a large portion of the funds that TECA has ordered it to repay. Beyond that, the mitigating circumstances heavily outweigh any wrong that, viewed retrospectively, Exxon may be held to have committed. TECA erroneously failed to exercise the "qualities of mercy and practicality" that constitute "the essence of equity jurisdiction." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). Holding Exxon liable for sales made by the other interest owners, moreover, violated the statutory limitation of liability to "moneys received," a provision that on its face prohibits vicarious liability. At a minimum, TECA should have held Exxon liable only for its own production and should have measured that liability by the amount of new oil reported by Exxon in excess of that which would have been reported in the absence of unitization and enhanced recovery.

TECA further erred in its assessment of prejudgment interest. Without any thoughtful analysis, and on the pretext of depriving Exxon of the benefit of the use of money Exxon in fact had never had and therefore could not have used, the court ordered Exxon to pay prejudgment interest at very high rates—calculated, moreover, on a very dubious basis. *See* note 18, *supra*. This interest was required to be paid to the several States, which had not themselves been deprived of the use of any money. That treatment cannot be squared with this Court's pronouncements concerning prejudgment interest:

> The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable.

Board of County Commissioners v. United States, 308 U.S. 343, 352 (1939). There was no equitable justification in this case for the lower courts' obviously excessive award of prejudgment interest. *See, e.g., Blau v. Lehman*, 368 U.S. 403, 414 (1962); *Rodgers v. United States*, 332 U.S. 371 (1947).

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In this case, Exxon did precisely what national energy policy sought to encourage—at very considerable cost, it produced a very substantial incremental amount of domestic crude oil. When doing so, Exxon tried to follow the pertinent regulations and was completely open and above-board in all its dealings with FEA. The regulations themselves were cryptic, and no one, least of all FEA, knew for sure what they meant.

FEA could not make up its mind how units should be treated. It privately assured Exxon and others that lease-by-lease accounting was permitted, and its adjudicatory body, the Office of Hearings and Appeals, even held that such accounting was required. *See* note 27, *supra*. FEA then went on perhaps the most curious binge of chopping and changing in the annals of regulatory law. When all the dust had cleared, Exxon was left with almost the harshest and most discriminatory set of retroactive rules imaginable—mitigated only by FEA's promise of an opportunity to establish a reasonable alternative on a case-by-case basis.

The courts then applied FEA's retroactive hodgepodge of regulatory prescriptions in an even harsher manner than the agency itself had intended—even giving the regulations a meaning, sharply adverse to Exxon, that FEA expressly had rejected as substantively invalid. DOE and the courts, moreover, broke FEA's promise of case-by-case evaluation of reasonable alternatives; the courts, without even conducting a hearing, left Exxon bereft of the remedy made available by the agency's own rules.

The result of all this manifest unfairness has been the imposition of a staggering and unprecedented liability—an imposition that is without any basis in law and that violates the most central precepts of due process. This Court should grant review to reaffirm, in a highly visible and important case, the primacy of the fundamental rules of administrative law and due process that were consistently flouted by the courts below.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Supreme Court, U.S.
FILED
SEP 13 1985
JOSEPH F. [illegible], JR.
CLERK

85-429

No. 85-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EXXON CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Nos. DC-91 through DC-100
(Consolidated)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
and

STATES OF ALABAMA, ARKANSAS, CALIFORNIA, *et al.*,
Intervenor-Appellees,
v.

EXXON CORPORATION,
Defendant-Appellant; (No. DC-93)

NATIONAL OIL JOBBERS COUNCIL and the JOBBERS' GROUP,
Intervenor-Appellants; (No. DC-91)

GLADIEUX REFINERY, INC., and
U.S. OIL AND REFINING COMPANY,
Intervenor-Appellants; (No. DC-92)

INDICATED REFINERS, Champlin Petroleum Company,
Ashland Oil, Inc., Tenneco Oil Company,
American Independent Refiners Association,
Pennzoil Company, and Texas City Refining, Inc.,
Intervenor-Appellants; (No. DC-94)

GASOLINE RETAILERS, Luther Griffin, t/a Palmer
Highway Exxon, Edward McGovern, t/a Maple
Avenue Exxon, Anthony Monaco, t/a Milltown
Exxon Servicecenter, Inc., Donald E. Skilling,
t/a Edon Service Corp., Tex Shipley,
t/a Shipley's Standard Service,
Intervenor-Appellants; (No. DC-95)

TOSCO CORPORATION,
Intervenor-Appellant; (No. DC-96)

PHILADELPHIA ELECTRIC COMPANY,
Intervenor-Appellant; (No. DC-97)

AIR TRANSPORT ASSOCIATION OF AMERICA,
Intervenor-Appellant; (No. DC-98)

GERALDINE H. SWEENEY, RJG CAB, INC.,
NATIONAL FREIGHT, INC.,
Intervenor-Appellants; (No. DC-99)

MARATHON PETROLEUM COMPANY,
MOBIL OIL CORPORATION, and
MURPHY OIL CORPORATION,
Intervenor-Appellants. (No. DC-100)

On Appeal from the United States District Court
for the District of Columbia

(Civil No. 78-1035)

(Argued: May 23, 1984 Decided: July 1, 1985)

Before WILLIAM H. BECKER *, WESLEY E. BROWN, and ROBERT E. MAXWELL, *Judges*.

WESLEY E. BROWN, Judge.

---

* Judge Becker filed an opinion, attached hereto, concurring in part and dissenting in part.

I. STATEMENT OF THE CASE

These appeals arise from an action filed in the District of Columbia by the United States against the defendant-appellant, Exxon Corporation, pursuant to the provisions of Sections 208(b), 209, of the Economic Stabilization Act of 1970, 12 U.S.C.A. Section 1904 note.[1] (Hereafter, ESA)

The United States sought civil penalties and restitution from Exxon for overcharges which occurred in an unitized field known as the "Hawkins Field Unit," (HFU) located near Tyler, Texas. It was claimed that the overcharges resulted from miscalculations of "old" and "new" oil within HFU from January, 1975, until the end of price controls in January, 1981.

Upon cross motions for summary judgment, the District Court found that Exxon had violated the two-tier oil price regulations set out in 10 CFR Sections 212.73, 212.74 (1975). *United States v. Exxon Corp.*, 561 F. Supp. 816 (D. D.C. 1983).[2]

---

[1] Section 208 of the Act, paragraph (a) provides for a $5,000 criminal fine for violations, while paragraph (b) provides for a civil penalty of not more than $2,500 for each violation.

Section 209 states that the Attorney General may bring an action for temporary and permanent injunction to restrain violations. In addition, the Court is authorized to:

> ". . . issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation."

[2] Prior to this appeal Exxon moved to dismiss the case for lack of subject matter jurisdiction. The District Court denied that motion. *United States v. Exxon Corp.*, 470 F.Supp. 674 (D. D.C. 1979). This Court affirmed on the basis of the

Although Exxon did not own all of the production in HFU, the Court found that it, as Operator, had caused, and was responsible for, the violations, and that it was therefore liable, in restitution, for all of the overcharges arising from the violations, an amount exceeding $895 million during the period in question. With interest, the judgment entered in this action exceeds $1.6 billion.[3] Under the District Court's findings, the sum ultimately paid in restitution will be distributed to the separate States and Territories, in accordance with guidelines established by Congress in Section 155 of Pub. L. 97-377, 96 Stat. 1830 (1982), sometimes referred to as the "Warner Amendment."

District Court's opinion. *Exxon Corp. v. United States,* 616 F.2d 526 (TECA 1980).

In August, 1980, Exxon moved to dismiss the case for lack of indispensable interest owner parties. This motion was denied. *United States v. Exxon Corp.,* 94 F.R.D. 252 (D. D.C. 1981).

In January, 1981, the District Court, upon motion of the DOE, enjoined Exxon from litigating any legal issue presented in this case in connection with its defense in a case pending in Texas, styled *Jarvis Christian College v. Exxon Corp.,* No. TY-80-43A-CA (E.D. Tex., filed November, 1980).

In *Exxon Corp. v. United States,* 655 F.2d 1112 (TECA 1981) we determined that all pricing and regulatory issues should be heard in the District of Columbia action, and all proceedings in the *Jarvis* action were stayed pending final determination in that District.

[3] The judgment required Exxon to remit to the Treasury Department the sum of $1,635,604,638.10, representing $895,501,163.85 in overcharges, and $740,103,474.25 in interest in overcharges, and $740,103,474.25 in interest, accumulated through March 31, 1983, plus $469,035.40 per day in interest, for each day of April, May, and June, 1983, to date of judgment (June 7, 1983), with interest thereafter to be computed in accordance with 28 U.S.C. Section 1961.

II. THE PARTIES AND CONTENTIONS ON APPEAL

Eleven separate appeals were filed in this Court, but the United States has dismissed its cross-appeal of the denial of civil penalties, and that issue is no longer in controversy at this stage of the proceedings.

The principal contenders appear in Case No. DC-93, in which Exxon appeals the grant of summary judgment to the United States. The multiple issues which have been raised in this appeal will be discussed at length, but for present purposes it may be said that the questions here are directed principally to liability and the proper interpretation of the applicable regulatory framework. In particular, of course, is Exxon's objection to the finding of liability by summary judgment, without an evidentiary hearing. Exxon likewise disputes the extent of its liability, and the legality of ordering payment into the United States Treasury for distribution to the States and Territories.

Exxon also raises the question of this Court's jurisdiction, in view of the recent decision of the Supreme Court in *Immigration and Naturalization Service v. Chadha, et al.*, —— U.S. ——, 103 S.Ct. 2764, 77 L.Ed.2d, 317 (1983). It is suggested that its liability, if any, will be "significantly reduced, if not eliminated altogether" by the *Chadha* ruling.

The remaining cases are appeals filed by various "Intervenor Appellants," who were permitted to intervene by the District Court, after judgment was filed, for the purpose of setting forth their various claims to a share in restitution, and their claims against the judgment. None of these appellants supports the claim of appellant Exxon on the issue of liability. They appeal only from that portion of the judgment which requires that all of the restitution funds be disbursed to the States without any attempt to first identify and compensate various pur-

chasers of petroleum products who were the alleged victims of Exxon's violations.

The various Intervenor Appellants are:

Case No. DC-91—

National Oil Jobbers Council and the Jobbers' Group;

Case No. DC-92—

U.S. Oil & Refining Co., and Gladdieux Refinery, Inc., appearing as "Old Oil Entitlements Program" participants;

Case No. DC-94—

Intervenors, referred to as "Indicated Refiners," also participants in the Entitlements Program;

Case No. DC-95—

Intervenors, referred to as "Gasoline Retailers" who claim to have been directly injured by Exxon violations;

Case No. DC-96—

Tosco Corporation, Intervenor, a participant in the Entitlements Program, and also a direct purchaser of crude oil from Exxon;

Case No. DC-97—

Philadelphia Electric Company, representing a class of purchasers, and consumers of petroleum products;

Case No. DC-98—

The Air Transport Association of America, representing the air transportation industry as a consumer of petroleum products;

Case No. DC-99—

Geraldine Sweeney, an automobile owner, RJG Cab, Inc., and National Freight, Inc., commercial transportation companies, all end users of refined petroleum products;

Case No. DC-101—

Intervenors Marathon Petroleum Company, Mobil Oil Corp., and Murphy Oil Corp., also participants in the Entitlements Program.

In addition to the Intervenor Appellants, the appeals include a group of Intervenor Appellees, these being the various States of the United States. These Intervenors support the remedy ordered by the District Court, whereby the monies paid in by Exxon will be distributed among the States and Territories.

Other groups and organizations, appearing as Amici Curiae, present additional questions which touch upon the direct issues raised on appeal. In this respect, the owners of working interests in HFU, who have heretofore entered into "global settlements" with the Department of Energy on other occasions, contend that they may be adversely affected by a precedent established in these cases. The Navajo Nation asserts its rights as an end consumer of refined petroleum products, and complains also that as a sovereign political entity, it is entitled to share equally with the States and Territories in any distribution of the judgment in this case. The Chamber of Commerce of the United States objects to "retroactive law-making" by the district court. The American Petroleum Institute objects to distribution of the judgment to "unidentified consumers" without any effort being made to reimburse members of the petroleum industry who sustained damage from the Exxon violations. R. Lacy Inc., an interest owner in the Hawkins Field, is concerned with the question of contribution and indemnity, should Exxon's liability for all overcharges in the Unit be affirmed. The "Low Income People Together," et al., appear on behalf of some thirteen community organizations across the country which represent senior citizens, tenant organizations, etc. Such groups would be among the ultimate beneficiaries of any distribution of funds to the States pursuant to guide-

lines set out in Section 155 of Public Law 97-377. Total Petroleum, an Intervenor in *In re The Department of Energy Stripper Well Exemption Litigation*, M.D.L. No. 378, now pending in the District of Kansas, appears to urge that it was error to fashion a restitution remedy without consideration for the rights of direct purchasers of petroleum products. Total Petroleum claims that the remedy and judgment in this action will have important consequences for the parties involved in the *Stripper-Well* litigation.

III. REGULATORY FRAMEWORK

The controversy between Exxon and the Government [4] concerns the manner in which accountings were made in determining the identity and quantity of "new oil" removed from HFU. The overcharges which accrued here are attributable to the fact that Exxon, in making this determination, calculated upon a "lease by lease" basis, rather than upon a unit-wide comparison of field production.

The regulatory history of the Economic Stabilization Act of 1970, 12 U.S.C. Section 1904, Note, (ESA) and the subsequent passage of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. Sections 751 et seq., (EPAA) has been many times reviewed by this Court, most recently in *Exxon Corp. v. United States Dept. of Energy*, 744 F.2d 98 (TECA 1984), *cert. den.* —— U.S.

---

[4] For simplicity's sake, the Department of Energy (DOE), and the predecessor administrative organizations which have been charged with the duty of enforcing price regulations from time to time—the Cost of Living Council (CLC), the Federal Energy Administration (FEA), and the Federal Energy Office (FEO), are generally referred to hereafter as "the agency," and sometimes as "the government." For further explanation, see *Pennzoil Co. v. United States Dept. of Energy*, 680 F.2d 156, at 161, and Footnotes 6, 7, (TECA 1982), *cert. dismissed*, 459 U.S. 1190 (1983) (hereafter *"Pennzoil"*.)

—— (December 3, 1984). It is sufficient to state that the purpose of petroleum price regulation was to ensure fair allocation of petroleum resources at equitable prices and to encourage the search for new energy resources.

Basic to the regulation of petroleum prices was a "two-tier" pricing structure, whereby monthly oil production which was less than, or equal to a corresponding 1972 level of production from a "property" was to be sold as "old" oil at a posted price, while production in excess of the 1972 level could be sold as "new" oil, at prices substantially higher. May 15, 1973, 10 C.F.R. Sections 212.73(b), and 212.74(b). The "based production control level," or "BPCL" by which "old" and "new" oil production was to be determined was basically defined, with respect to months ending prior to February 1, 1976, as "the total number of barrels of domestic crude oil produced and sold from that property the same month of 1972;" 10 C.F.R. Section 212.72.

Since all computations of old and new oil were to be made on the basis of production levels from a "property", it was necessary to determine the boundaries of each "property." The term "property" was broadly defined as "the right which arises from a lease or fee interest to produce domestic crude petroleum." See 10 C.F.R. Section 212.72, January, 1974. In February, 1976, the property definition was slightly restructured, without substantive change, to read "the right to produce domestic crude oil which arises from a lease or from a fee interest." Effective September 1, 1976, the definition of property was changed so that separate reservoirs subject to a single right to produce could thereafter be treated as separate properties. R. 37,606. See *Department of Energy v. Louisiana*, 690 F.2d 180 (TECA 1982), *cert. den.* 103 S.Ct. 1522; *Pennzoil Co. v. United States Dept. of Energy*, 680 F.2d 156, 162, note 9. (TECA 1982), *cert. dismissed*, 459 U.S. 1190 (1983).

Questions arose in the case of properties which were not unitized in 1972. This was the situation of Hawkins Field, which did not become formally unitized until January 1, 1975. On five separate occasions in 1974 and 1975, the General Counsel of the Federal Energy office issued interpretations to the effect that unitized multi-lease units were single properties. These interpretations were later published in May, 1977. *See Pennzoil, supra.*

This same interpretation was issued as a general guideline for the industry in August, 1975, in the form of Ruling 1975-15. With respect to properties unitized after 1972, the Ruling provided that:

> ". . . the need for comparison of like quantities requires the producer in computing the BPCL to measure and total the individual 1972 monthly production levels for each of the leases that now comprise the unit. Accordingly, for example, where a unit consists of several leases that were unitized in 1973, the property consists of the unit, and the BPCL is the total 1972 monthly production from all of the several leases that now comprise the unit."

A few months later, and in December, 1975, Congress enacted the Energy Policy and Conservation Act ("EPCA"), which allowed the agency to permit price increases, without current increases in production, when the agency found that such price increases would give incentives for "enhanced recovery techniques." 15 U.S.C. Section 757(b)(2)(A); *DOE v. Louisiana, supra,* 690 F.2d at 185.

The agency then proposed a new regulation, and after considering comments, adopted 10 C.F.R. Section 212.75, which applied only to "operators of 'enhanced recovery' units formed on or after" *February 1, 1976:*

> "(a) *Rule.* A producer shall, as of the date of implementation of enhanced recovery operations on a unit or as of the date production patterns with respect to individual leases within a unit are substan-

tially altered (which ever date occurs first) establish a unit base production control level for the unit.

* * * *

" 'Unit base production control level' means the total number of barrels of old crude oil (1) produced and sold from all properties that constitute the unit plus (2) the total number of barrels of crude oil produced from all stripper well leases that constitute the unit during the 12 month period immediately preceding the establishment of a unit base production control level for the unit, such total divided by 365, multiplied by the number of days in that particular month.

" 'Unit' means the right to produce crude oil that arises from a unitization agreement approved by the applicable state or municipal regulatory authority . . . ."

The term "enhanced recovery" was defined by Section 212.75 as

". . . any method, previously approved by applicable state or municipal regulatory authority . . . of recovering crude oil in which part of the energy employed to move the crude through the reservoir is applied from extraneous sources by the injection of liquids or gases into the reservoir."

In addition to adopting Section 212.75, discussed above, the old Section 212.72 was amended to allow operators of all other properties the option of calculating a new BPCL equal to 1975 old oil production. This had the effect of lowering the BPCL at properties where production had declined.

In the preamble to Section 212.75, the agency also announced that Ruling 1975-15 would be rescinded *ab initio* insofar as it required producers of unitized properties to treat the unit as a single property *upon unitization.* The producers were given permission to delay implementing a unit BPCL until there "has been a signifi-

cant alteration in pre-unitized producing patterns of the individual leases." The preamble further noted that:

> "If a significant alteration of producing patterns does not occur until the actual implementation of enhanced recovery operations, the unit operator may continue to determine quantities of upper tier crude oil . . . on a lease-by-lease basis. *Once enhanced recovery operations begin, the producer will be required to calculate a unitized BPCL,* as set forth in new 10 CFR 212.75 . . . and to treat the unit as a distinct property." (Emphasis supplied.)

In August, 1976, after the agency received comments on the definition of the term "significant alteration in producing patterns" as used in Section 212.75, the term was formally defined as follows:

> " 'Significant alteration in producing patterns' means the occurrence of either (1) the application of extraneous energy sources by the injection of liquids or gases into the reservoir, or (2) the increase of production allowables for any property that constitutes the unitized property." 10 C.F.R. Section 212.75(b).

In January, 1977, the agency issued Ruling 1977-2, stating that the definition of "significant alteration" contained in Section 212.75 would be considered as a "guidance in audits and compliance cases" involving pre-existing units subject to Section 212.72. At that time it was announced that those operating units subject to Section 212.72 would be permitted "to justify the establishment of the date of 'significant alteration' on 'reasonable bases' other than injection or an increase in production allowables.[5] [*sic*]

---

[5] Paragraph IV(A)(3) of Ruling 1977-2 applied to all unitized properties required to establish a unit BPCL prior to February 1, 1976 and unitized properties required to establish a unit BPCL prior to September 1, 1976. Determinations of the status of oil produced from units formed prior to the

To summarize these regulations then, it may be stated that

a) the agency interpreted 10 C.F.R. Section 212.72 to require a producer to calculate a single aggregated BPCL for multi-lease units, as of the date of unitization. Ruling 1975-15 so required;

b) In February, 1976, the agency changed this requirement, and allowed Operators of units already formed to delay implementation of a unit BPCL until the date on which producing patterns were "substantially altered;"

c) In addition, and in February, 1976, the agency adopted 10 C.F.R. Section 212.75 which applied only to operators of enhanced recovery units formed on or after

---

date on which unit BPCL regulations were adopted (February 1, 1976 for enhanced recovery units and September 1, 1976 for all units) were subject to the provisions of Ruling 1975-15, as modified on February 1, 1976. Therefore:

> ". . . all such units formed during or after 1972 were required to calculate a BPCL by aggregating the BPCL's of all the participating properties at such time as significant changes in the units producing patterns occurred (and with respect to enhanced recovery unitized properties beginning February 1, 1976, as of the date of implementation of enhanced recovery operations).

The Ruling then provided:

> "Although a regulatory definition of 'significant alteration in producing patterns' was not provided until September 1, 1976, that definition will be considered as guidance in audits and compliance cases in determining whether a significant alteration has occurred with respect to such units. FEA will, however, on a case-by-case basis, permit unit operators to justify the establishment of the date of significant alteration in producing patterns in such units on reasonable bases other than those specified by the present definition."

February 1, 1976. This provided prospective incentives for oil producers to enhance long-run production through future unitizations;

d) In January, 1977, by Ruling 1977-2, the agency determined that the definition of "significant alteration in producing patterns," first published in September, 1976, would be used as "guidance" in determining whether a significant alteration occurred in pre-existing units.

IV. THE HAWKINS FIELD.

The record on appeal in this case consists of over 39,000 pages in 47 volumes. Included in this record are over 500 exhibits, consisting of more than 6,000 pages, which were presented to the District Court in support of the cross motions for summary judgment. Many of these exhibits are from Exxon files—inter-office memos, copies of correspondence, reservoir studies, oil production ledgers and schedules, and computer print-outs. In addition, the District Court had records and orders of the Texas Railroad Commission, which regulated the Hawkins Field, and the parties' statements of uncontested material facts.

From this evidence, the District Court made findings of fact concerning the history of the Hawkins Field, and Exxon's application of pricing regulations to the production from that field. These findings may be summarized as follows:

A. *Development of the Unit.* Oil was discovered in the 10,000 acre field near Tyler, Texas in 1940. By the late 1940's, more than 200 individuals and companies produced oil on more than 300 leases in the field. In 1969 Exxon, (through its predecessor, Humble Oil and Refining Company), owned two-thirds of the field's production.

Under state law, the Texas Railroad Commission regulated the number of oil wells within the field, as well as the number of barrels of oil each well could produce. These were termed "production allowables."

The Hawkins Field was what is termed a "MER field" in Texas. In such fields the Texas Commission assigned an aggregate allowable for the entire field, which was called the maximum efficient rate of production, or "MER". This was a limit on the number of barrels which could be pumped daily from the field as a whole. The advantage of the "MER" designation was that whenever a lease operator could not produce its allowable, the Commission distributed pro rata, any unused allowable from one lease to every producing well in the field.

By mid-1960 the natural reservoir pressure in the field declined, allowing invasion of water and loss of oil into the fi[illegible]s original gas cap. The interest owners, led by Exxon, determined that this trend could be reversed, and the life of the field prolonged, by means of an enhanced recovery project. This would require the construction of a plant to produce inert gas, which would then be injected underground in order to increase the reservoir pressure.

Before the recovery project could proceed, it was necessary that the field be unitized in order that the costs of the gas plant could be spread among the owners, and also because the injection of gas would cause crude oil to flow underground across lease lines. As noted by the District Court, when a field becomes unitized it most likely results in the shutting in of wells within certain leaseholds, and the increase of production at others, because enhanced recovery operations cause oil to flow underground across lease lines. In such circumstances, payments to unit participants are not based upon actual production from a particular well, but upon an imputed percentage

of the unit's total production. *United States v. Exxon Corp., supra*, 561 F.Supp., f.n. 6, p. 820.

In 1969 Exxon actively began to promote unitization, meetings were had with 300 other working interest owners in the field, and negotiations went on with more than 2,200 royalty interest owners. At this time, Exxon secured permission from the Commission for an interim conservation project, whereby up to 20 million cubic feet of natural gas per day could be injected into the field for the purpose of increasing production. In November, 1974, and in anticipation of unitization, the Commission increased the Hawkins Field MER from 87,000 barrels per day to 112,000 barrels per day.

In late 1974 the Unit Agreement was finally executed and approved by the state Commission. Under its terms, Exxon was named Unit Operator, costs of the proposed gas plant were to be shared, and production was divided according to a formula based upon estimates of the recoverable reserves under each tract.

At the time the Unit Agreement was approved the state Commission provided Exxon with a "unit production allowable," to be effective on January 1, 1975. Under prior Commission orders, the production allowable of an individual shut-in well could be transferred only pro rata among all other wells at the Hawkins Field. The new "unit allowable", which was equal to the then existing MER of approximately 112,000 barrels per day, allowed Exxon to transfer production among wells within the unit, *at will.*

The natural gas injections which were initially permitted by the state Commission in 1969, continued beyond the effective date of unitization, and through the years, until the inert gas plant was completed and put into operation in March, 1977.

B. *Exxon's Pricing Policies.* The trial court found; that when oil price control regulations were initiated in

1973, Exxon already operated several multi-lease units, some of which, like Hawkins Field, were formed after 1972, the base year designated for calculation of the BPCL; that Exxon applied an aggregated, unit, BPCL at other units it operated in Texas, California, Alabama and Florida; that Exxon departed from this practice at Hawkins Field following a determination it made in 1974 that an 80% reduction in the amount of new, released and stripper oil which could be claimed would follow if calculations were made upon a unit basis.

Exxon contends that the trial court's finding that "Exxon departed from its prior practice" at Hawkins Field was erroneous and based upon a "one-sided view of disputed evidence," inasmuch as "Exxon's prior practice was to review its general guidelines, the many oral and written modifications thereto, and then to examine each situation carefully and independently—which was the same practice employed at the HFU."

Exxon's argument is without merit. Exxon's own records establish that in the fall of 1973, following initial price regulation, Exxon issued instructions to treat several multi-lease units which it operated as single properties, with a single, unit BPCL. These instructions included units formed after 1972, the base year designated in the regulations for the calculation of the BPCL. In accordance with this practice, Exxon applied an aggregated, unit BPCL at units it operated in Texas, California, Alabama and Florida. These units included the Friendswood Unit, unitized on September 1, 1973. As an interest owner, and as a purchaser of crude oil, Exxon received notification from many other companies that units were to be treated as single properties, each with a single, aggregated BPCL. Nevertheless, when Hawkins Field was formally unitized on January 1, 1975, Exxon thereafter did in fact apply individual lease-by-lease BPCL calculations.

When Ruling 1975-15 was issued in August, 1975, making explicit the regulations' requirement that a unit

BPCL be calculated and applied to every unit, as of the date of unitization, Exxon, along with other industry critics requested modification or clarification of the Ruling. When the February, 1976 amendments to the oil price regulations were under consideration, Exxon suggested that the provision for lease-by-lease calculation of exempt oil should be extended for two years after formation of the unit, or until injection began in an enhanced recovery project. Exxon also urged that the same rules be applied to units formed *before* February 1, 1976. As noted, however, the February, 1976 amendments adopted by the agency applied only some of the new incentives to pre-existing units, and provided that the new Section 212.75 would only apply prospectively.

Following a meeting in mid-February, 1976, with agency representatives, Exxon decided that until the meaning of the new regulations was "clarified," it would be proper to continue its lease-by-lease calculations at the Hawkins Field, and it so advised the other interest owners.

The agency solicited comments in April, 1976, as to how best to determine when there was "a significant alteration" in producing patterns. Exxon suggested that the term be defined as "the initiation of the major injection or other programs contemplated by the unit, provided however that the date will be no longer than two years from the formation of the unit." The agency in August, 1976, published the definition of "significant alteration in producing patterns" as being either the injection of liquids or gases into the reservoir or the increase of production allowables for any property constituting the unit. Exxon then determined that the regulations did require the calculation of an aggregated, unit BPCL for the Hawkins Field Unit, but it did so only as of September 1, 1976, and then under the more generous provisions of Section 212.75. Exxon continued this manner of calculation until the repeal of the oil price regulations in January, 1981.

In reviewing the production data from the Hawkins Field, the Trial Court concisely illustrated the effect of Exxon's pricing policies which we described above:

> "From January 1975 through August 1976 production at the Hawkins Field remained relatively stable at about 112,000 barrels per day. . . . Thereafter, despite the implementation of the inert gas enhanced recovery project in March 1977, production began to decline, to about 90,000 barrels per day in July 1977, and finally dropping to about 45,000 barrels per day in January 1981 at the same time oil prices were decontrolled . . . . Despite the steady decline in production, an increasing percentage of oil was accounted for by Exxon as upper-tier, higher-priced oil, until beginning June 1, 1979 *almost all* of the then 62,000 barrels per day was classified as new oil." 561 F.Supp. at 825. (Emphasis supplied.)

V. CONCLUSIONS OF THE TRIAL COURT

In sustaining the Government's motion for summary judgment the trial court made a series of determinations applicable to our consideration of these appeals.

1. Section 212.72, the unit property regulation, was procedurally valid. 561 F.Supp. at 826-829. That issue has not been raised on appeal.

2. Under *Pennzoil*, *supra*, a unitized field must be considered a single property for purposes of computing a unit BPCL.

3. The rescission of Ruling 1975-15, which had required that a BPCL be established upon unitization, was not a mere "relaxation in enforcement policy," as claimed by the government. The agency's Ruling in February, 1976 "amounted to a completely new, although less strict, interpretation of the property definition found in Section 212.72." 561 F.Supp. at 835.

4. The agency's determination in 1976 to allow unit operators subject to 10 C.F.R. Section 212.72 to postpone

adoption of a unit BPCL until the occurrence of a "significant alteration in producing patterns," was reasonable. The definition of this term, as being either "the application of extraneous energy sources by the injection of liquids or gases into the reservoir," or, "the increase of production allowables for any property that constitutes the unitized property," was consistent with the intent of Congress that the administration of price controls be workable and effective.

5. A "significant alteration in producing patterns" occurred at Hawkins Field on January 1, 1975, the date of unitization, because Exxon then transferred production allowables among contingent leases, thus significantly altering producing patterns within the field. In addition, Exxon was also injecting gas on that date. 561 F.Supp. at 843. Under these circumstances, Exxon's obligation to calculate a unit BPCL then accrued.

6. Exxon failed to establish a reasonable alternative basis to justify a finding of significant alteration in producing patterns in the field on a date other than January 1, 1975. A date based upon evidence of the field's "underground drive mechanism" would not be a reasonable alternative basis because it would not be a workable system for enforcing the pricing program.

7. Exxon's estoppel defense is without merit because the undisputed facts in the case establish that its reliance, if any, on unauthorized, informal statements of agency employees, was not reasonable. Furthermore, even if there was reasonable reliance, the government pursued "important national policy objectives" in its pricing regulations, and these objectives should not be frustrated by allowing Exxon "unjustly to reap huge profits from its dubious exploration of the limits of regulatory tolerance." 561 F.Supp. at 848.

8. Since Exxon caused all of the overcharges in the field by its pricing, injection and production decisions, it

is liable for full restitution of all the overcharges, with interest.

9. Civil penalties would not be imposed because Exxon did not attempt to conceal its pricing practices.

10. Since it would be "impossible" to identify the ultimate victims of Exxon's overcharges, due to the "pervasive system of price controls" in the petroleum industry, the Trial Court adopted a remedy used by Congress in a similar situation, and ordered Exxon to remit all overcharges to an escrow account in the United States Treasury to be held in trust by the Treasury, for future disbursement to the States for the ultimate purpose of funding specific energy conservation programs, in accordance with procedures set out in Section 155 of Pub. L. No. 97-377, 96 Stat. 1830, 1919 (1982). In so doing, the trial court also stated: (561 F. Supp. at 856).

> "In formulating its order, the court in no way relies on Section 155 as an express statutory grant of authority to this court, but acts instead in the exercise of its broad equitable powers to order restitution."

VI. ISSUES ON APPEAL

Exxon's contentions in this appeal may be summarized in the following manner:

A. The District Court violated established summary judgment principles in granting judgment to the Government because it improperly resolved factual disputes, ignored relevant evidence, viewed all evidentiary inferences in favor of the DOE, and improperly assumed to be true facts outside the record.

B. The District Court erred in summarily determining Exxon's liability because:

1. The history of the unit property rule establishes that Hawkins Field Unit was not subject to

the definition of "significant alteration in producing patterns" set out in 10 CFR Section 212.75;

2. The restrictive definition of "significant alteration in producing patterns" can not be given retroactive effect;

3. Retroactive application of only selected portions of 10 CFR Section 212.75 is arbitrary and capricious;

4. When a "significant alteration in producing patterns" occurred at the Hawkins Field Unit was an issue for resolution at trial;

5. Ruling 1977-2 expressly provides that Exxon be afforded an opportunity to establish a reasonable alternative "significant alteration" date for the HFU.

C. The District Court erred in summarily determining questions of remedy in favor of the DOE because:

1. Monetary awards to uninjured state governments are not restitution;

2. Monetary awards to uninjured state governments improperly expose Exxon to multiple liability;

3. The District Court assessed liability on the basis of unpleaded and unproved refiner allocation violations;

4. The amount of the judgment is grossly overstated;

5. Exxon's liability must be reduced, if not eliminated, in view of the unconstitutional one-house veto provisions in the EPAA and the EPCA.

D. The District Court erred in requiring Exxon to pay on behalf of other interest owners alleged overcharges received by them, because the evidence did not establish that Exxon can be reimbursed for such payments;

E. The District Court erred, as a court of equity, in requiring restitution of the full amount of the alleged overcharges and prejudgment interest because:

1. Restitution is an equitable remedy that implicates questions of fairness;

2. A balancing of equities requires an evidentiary hearing;

3. Restitution of the full amount of the alleged overcharges is inequitable;

4. Awarding prejudgment interest is inequitable.

The Government's contentions in this appeal may be summarized in this manner:

A. The District Court correctly held that a single BPCL had to be adopted at the Hawkins Field in January 1975 when it was unitized and a significant alteration in producing patterns occurred, because:

1. This Court has previously determined that Section 212.72 required establishment of a single BPCL upon unitization;

2. The District Court properly applied the less stringent Ruling 1977-2, permitting a unit operator to delay establishment of a single BPCL until occurrence of a significant alteration;

3. The District Court properly granted summary judgment upon the basis of Exxon's own undisputed data, because:

a. Under the definition of significant alteration used as guidance, a significant alteration occurred on January 1, 1975; and

b. The District Court correctly held that Exxon failed to justify the date of the significant alteration on any other reasonable basis.

B. The District Court properly concluded that Exxon, the Operator who caused the overcharges, is liable for all overcharges with interest, because

1. Exxon is liable for all overcharges at the Unit under *Sauder v. DOE*, 648 F.2d 1341 (TECA 1981);

2. Exxon is entitled to no reduction as a result of consent orders between DOE and other companies; and

3. The District Court did not abuse its discretion by awarding interest on the overcharges at the rates provided.

C. The District Court properly concluded that payment of Exxon's overcharges to the states is a lawful and appropriate remedy to effectuate restitution in this case, because

1. The District Court correctly concluded that the overcharges were so widely distributed through the operation of price controls that individual harm could not be calculated with reasonable certainty; and

2. The District Court reasonably exercised its broad discretion to fashion a remedy—payment to the states—which achieves the central purpose of restitution under the EPAA.

VII. THE *CHADHA* ISSUE

Before proceeding to the question of the nature and extent of Exxon's liability in this case, we first address questions which have been presented by the recent decision of the Supreme Court in *Immigration and Naturalization Service v. Chadha, supra*, —— U.S. ——, 77 L.Ed.2d 317 (1983).

Judgment was entered in this action on June 7, 1983. The day before Exxon filed its notice of appeal with this Court, it moved for "reconsideration" of the trial court's decision on the ground that, in view of *Chadha*, the entire EPAA should be retroactively declared void because of an allegedly unconstitutional provision in Section 4(g)(2) of the Act which allowed either House of Congress to veto executive actions.

The District Court denied the motion (a) because it was tardy since it involved an issue which was available, but not raised, prior to judgment; (b) because notice of appeal had been filed and the trial court was divested of jurisdiction; and (c) because Exxon lacked standing to challenge the statutory provisions because it could prove no injury due to the existence of the veto provision. It was also pointed out that the District Court was without power to determine such constitutional issues, jurisdiction being vested instead with the Temporary Emergency Court of Appeals.[6]

On appeal, Exxon claims that the *Chadha* issue remains viable, that it has standing to complain because its injury is obvious, that the veto provisions in question are not severable, and therefore the Act, and all regulations issued pursuant to the Act are void, *in toto.* In addition, it is claimed that the subject matter jurisdiction of both the trial court and this appellate court is placed in question by the *Chadha* precedent.

It is the position of the Government that the *Chadha* issue is not before the Court because, under appellate rules, the question was not timely raised.

The history of the veto provisions which appear within the Economic Stabilization Act of 1970, as well as Section 551, Section 552 of the Energy Policy and Conservation Act, P.L. 94-163, (EPCA), 42 U.S.C. 6201, Note, and the effect of those provisions in terms of the *Chadha* decision, have recently been examined at length by this Court in *Exxon Corp. v. United States Dept. of Energy, supra,* 744 F.2d 98 (TECA 1984), *cert. den.*, 105 S.Ct. 576, which involved certification of constitutional questions raised by *Chadha.*

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[6] Section 211(c) of the Economic Stablization Act of 1970, 12 U.S.C.A. Section 1904, note, provides that when a District Court determines that a substantial constitutional issue exists, it shall certify that question to the Temporary Emergency Court of Appeals.

Similar questions have not, of course, been certified under Section 211(c) in these appeals, but because some question has been raised by Exxon concerning this Court's jurisdiction, this panel of the Court will briefly address Exxon's arguments.

In April, another panel of this Court determined that the Gulf Oil Corporation had standing to challenge the subject matter jurisdiction of this Court by contending that the statutes granting jurisdiction contained unconstitutional legislative veto provisions. *Gulf Oil Corp. v. Dyke*, 734 F.2d 797 (TECA 1984), *cert. den.* 105 S.Ct. 173. In *Exxon*, we adopted that holding and in addition ruled that the *Chadha* decision would not be applied retroactively to invalidate all or any part of the EPAA, the EPCA, or the Regulations fashioned to implement those Acts. We further held that even if the rule of *Chadha* should be found to be retroactive, the veto provisions were severable, as found in *Gulf Oil Corporation, supra.* We further ruled that the Regulations were not unlawfully tainted by the presence of the one-House veto, or rendered invalid because the veto power had been exercised on two occasions in July, 1975.

We need not repeat what was said in *Exxon, supra,* with respect to the *Chadha* issue. This Court has determined that *Chadha* may not be used by the oil industry to escape the responsibilities owed to the nation and its people as represented by the law and regulations implemented by the DOE and interpreted by this Court.

We find that we have jurisdiction and that *Chadha* has no effect on any of the issues presented in these appeals.

VIII. THE LIABILITY ISSUE

Exxon contends that the District Court violated well established summary judgment principles in granting judgment to the Government, in that the trial court improperly resolved factual disputes, ignored relevant evidence, improperly resolved all evidentiary inferences in

favor of the Government and improperly assumed to be true facts outside the record.[7]

A. *The Pennzoil Decision.* Our discussion of the trial court's findings and Exxon's contentions regarding liability must begin with a consideration of this Court's decision in *Pennzoil Co. v. United States Dept. of Energy, supra,* 680 F.2d 156.[8]

The *Pennzoil* litigation was initiated by the company upon a claim that Ruling 1975-15 was invalidly promulgated, as an announcement of a new rule not previously inherent in, or justified by, prior regulations. In affirming summary judgment in favor of the government upon this claim, we determined that Ruling 1975-15 was a correct interpretation of 10 C.F.R. Section 212.72, requiring the establishment of an aggregated BPCL upon formation of a unit:

> "Ruling 1975-15 is an interpretative ruling, not a legislative change, *and simply made explicit what was implicit in the property definition from the beginning.*" (680 F.2d at 176)

This Court further held that Ruling 1975-15 was not unlawful "retroactive" legislation, for it did not represent a departure from well established practice, let alone an "abrupt departure" (Note 35, p. 176, 680 F.2d). We found that there was no basis for applying estoppel against the Government because of alleged confusing, misleading and contradictory information or Rulings supplied by agency officials. We refused to do so "on the facts here presented in favor of sophisticated oil field operators exploring the possibility of dubious regulatory leeway without even requesting an official interpretation." (680 F.2d at 177).

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[7] Fed. R. Civ. P. 56(c) provides that summary judgment can be granted only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."

[8] Exxon appeared as amicus curiae in *Pennzoil.*

The *Pennzoil* case was remanded to the District Court for trial of the Government counterclaim for enforcement of Ruling 1975-15. The case was settled upon Pennzoil's agreement to pay $14.75 million to the United States Treasury. See *Cities Service Co. v. Department of Energy*, 715 F.2d 572 (TECA 1983), *affirming Pennzoil Co. v. DOE*, 4 Energy Mgmt. (CCH) Paragraph 26,415 (D. Del. 1983).

B. *Unit Property Rule.* Exxon first claims that the regulatory history of the "unit property rule" establishes that HFU is not subject to the definition of "significant alteration in producing patterns" set out in 10 C.F.R. Section 212.75. In this respect, Exxon argues that the history of the regulation reveals prolonged agency indecision, the subsequent partial rescission of Ruling 1975-15, and the failure to explain or define the term "significant alteration in production patterns" until September 1, 1976 when the term was finally defined as part of an amendment to 10 C.F.R. Section 212.75. Exxon claims that since the Section 212.75 definition does not apply to units formed before September 1, 1976, the term "significant alteration in producing patterns" is only a general concept, when applied to those units, subject to an evidentiary determination upon a case-by-case basis.

According to Exxon, "(t)his result, of course, poses no conflict with this Court's decision in *Pennzoil* . . . (because) *Pennzoil* upheld Ruling 1975-15 but also expressly declined to consider the legal effect of the Ruling's . . . partial recission *ab initio* . . . . What we are concerned with here, however, and what was *not* decided in *Pennzoil*, is *when* must a multiple lease unit convert from lease-by-lease accounting to unit-wide accounting." (Brief for Exxon, n.283, p. 56).

In its insistence that the *Pennzoil* decision resolved only the question of whether HFU constituted a single "property", and not the question of "when" the Unit BPCL was to be calculated for that property, Exxon continues

to present arguments which were decided adversely to its position in that decision.

The issue posed by, and resolved in, *Pennzoil* was whether an "aggregation of (Pennzoil's 1972 lease) BPCL's (was required) *upon formation of a post-1972 multiple-property, enhanced recovery unit.*" 680 F.2d at 159 (emphasis supplied).

In *Pennzoil*, we recognized the fact that in February, 1976 the agency rescinded Ruling 1975-15, insofar as it required producers to treat the unit as a single property, before such time as there was "a significant alteration in pre-unitized producing patterns of the individual leases . . . ." Finding that this rescission did not "throw into question the validity" of Ruling 1975-15, as to previous production from unitized leases, we stated (f.n. 13, 680 F.2d at 164):

> "There is not now before us any issue concerning the application of this subsequent rule-making and we refrain from expressing any opinion concerning it *other than that it does not militate against our disposition of the issues presented to us on this appeal.*" (Emphasis supplied).

Under our decisions in *Pennzoil*, *supra*, and its predecessor, *Grigsby v. Department of Energy*, 585 F.2d 1069 (TECA 1978), *cert. den.* 460 U.S. 1086, it is clear that Section 212.72 *unembellished by any agency interpretations*, required the adoption of a single BPCL, *upon unitization. See also Francis Oil and Gas, Inc. v. Exxon Corp.*, 687 F.2d 484, at 488 (TECA 1982), *cert denied*, 459 U.S. 1010 (1982).

Under these circumstances, we find that Exxon's claim that *Pennzoil* does not control the question of "when" a unit must convert to unit wide accounting is without merit. Apart from Ruling 1975-15, Section 212.72 required the establishment of a single BPCL upon unitization of the Hawkins Field.

C. *Partial Rescission of Ruling 1975-15: The "Significant Alteration Test.* [*sic*]

As previously noted, in January, 1976, the agency, in response to the newly enacted EPCA, began proceedings leading to adoption of the new regulation, 10 C.F.R. Section 212.75, designed to provide new production incentives, prospectively. At the same time, and in February, 1976, the agency determined that a "limited part" of Ruling 1975-15, insofar as it required a producer to compute a single unit BPCL upon unitization, should be rescinded *ab initio*. The balance of Ruling 1975-15 was "affirmed in all other respects," see *Pennzoil*, 680 F.2d at 164, n. 13. It should also be remembered that the agency continued to point out that once a significant alteration in producing patterns had occurred at a unit, lease-by-lease accounting procedures would no longer be justified.

Ruling 1975-15 was rescinded only "insofar as it requires producers of unitized properties to total all the BPCL's of the participating leases and to treat the unit as a single property, *before such time as there has been a significant alteration in pre-unitized producing patterns of the individual leases.*" *Id.* (Emphasis supplied). Throughout the administrative proceedings leading to eventual adoption of a precise definition of "significant alteration in producing patterns" in August, 1976, it is clear that attention was centered upon the fact that lease-by-lease accounting was not permissible after some alteration in production methods precluded any "meaningful comparison" of current and base period production, since "the bulk of the actual production thereafter may be concentrated from only a few producing wells on fewer than all of the several leases. . . ." 41 Fed. Reg. at 4937. The agency noted that a significant alteration normally occurs when "enhanced recovery operations are begun, or . . . production from certain leases is reduced or discontinued in preparation for enhanced recovery opera-

tions." Id. "Enhanced recovery techniques," include the "inject(ion) (of) fluids or gases (which) may have originated in the reservoir . . . as long as they are injected by an extraneous energy source." 41 Fed. Reg. at 4938. In soliciting comments on a method of determining the point at which a significant alteration occurs, in April, 1976, the agency pointed out that:

> "it is . . . clear that due to the eventual *alteration* of lease-by-lease producing patterns, production from the unit must at some point be treated as the aggregate of production from all the participating leases, in order to obtain a meaningful comparison of production levels." 41 Fed. Reg. at 16181, (Emphasis supplied).

The formal definition of "significant alteration", which was finally selected by the agency in August, 1976, was, as previously noted, "the increase of production allowables for *any* property that constitutes the unitized property," or "the application of extraneous energy sources by the injection of liquids or gases into the reservoir." 10 C.F.R. Section 212.75(b). (Emphasis supplied.)

In the District Court, the Government contended that the partial rescission of Ruling 1975-15 was only "a relaxation of enforcement policy," with the "significant alteration" test serving only as a guidance in compliance audits. Exxon claimed that the "significant alteration" test constituted an entirely new regulation, which would not be applicable to the Hawkins Field Unit until September 1, 1976, the effective date of the formal definition of the term.

In ruling on the issue, the District Court ultimately determined that the significant alteration test "amounted to a completely new, although less strict, interpretation of the property definition in Section 212.72." *United States v. Exxon Corp., supra*, 561 F.Supp. at 835.

The District Court particularly noted, and was puzzled by, Exxon's insistence that the new test could not be

"retroactively" applied before September 1, 1976: (561 F.Supp., f.n. 39, p. 843).

> "Exxon's barrage of attacks on the agency's amendments to the regulations in February and September 1976—decrying their retroactive application, their discriminatory effect, and the rigor of their standard—is puzzling. If the court were to uphold Exxon's challenges, at most the court could invalidate all or part of Section 212.75 and the significant alterations test as applied to pre-existing units. *But that would not leave a vacuum.* Instead, there would remain to apply to the Hawkins Field Unit only Section 212.72, unembellished by either Ruling 1975-15 (rescinded *ab initio*) or by the significant alterations test. But the TECA has held in the *Pennzoil* case that implicit in the property regulation itself is the unit property rule, the requirement that a unit BPCL be calculated as of the date of unitization. . . . *Consequently, if Exxon's attacks were to succeed, it would still find itself in the position it is trying to escape. Exxon apparently seeks the best of all possible worlds. It would like the court to uphold the rescission of Ruling 1975-15 and to rewrite the rule which replaced it to suit Exxon's practices at the Hawkins Field, in effect leaving it free of any rule at all. The 1976 amendments to the oil price regulations cannot reasonably be read that way.*" (Emphasis supplied).

In an attempt to avoid the inconsistency in its argument which was noted by the trial court, Exxon has shifted ground in this appeal, and now relies upon what it perceives to be a "*generalized significant alteration test*" dependent upon a case by case evidentiary analysis.

In contending that the trial court erroneously determined the issue by summary judgment, Exxon first claims that this Court is somehow bound by its 1981 comment in *Exxon Corp, v. United States, supra,* found at f.n. 3, 655 F.2d at 1114, to the effect that the question of when a significant alteration occurred in producing patterns at

Hawkins Field was "the key factual question to be litigated at trial." This statement, of course, was *obiter dictum*, made without reference to the circumstances surrounding the partial rescission of Ruling 1975-15 or the enactment of 10 C.F.R. Section 212.75, and certainly without benefit of the record put before the trial court in 1983. Furthermore, we clearly noted that the four issues mentioned in this footnote were not before the Court in the 1981 appeal.[9]

In claiming that the trial court erroneously "rewrote" the generalized concept of determining whether or not there had been a significant alteration in the Hawkins Field, by its action in adding the "exceptionally restrictive" definition which was not adopted until September 1, 1976, Exxon presents several arguments against "retroactive" application of these tests.

In the first instance, Exxon recites much of the same type of "regulatory history" raised in the *Pennzoil* case with reference to claimed "agency indecision" and inconsistent positions which may have been taken by various agency officials from time to time. While Exxon has not specifically pressed its claim of "estoppel" on this appeal, it appears to rely upon some evidence which it claims

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[9] In the 1981 appeal we noted that there were four basic issues to be determined: 1) whether or not the Hawkins Field Unit is a single property or separate leases under 10 CFR Section 212.72 of the regulations; 2) assuming that the Hawkins Field Unit is a single property, then when did a significant alteration in producing patterns occur, thus establishing a unit base control level for pricing purposes under 10 CFR Section 212.72; 3) whether Exxon can be held liable for all overcharges in the field; and 4) whether the overcharges should be paid to the United States Treasury. In passing we stated that the question of when a significant alteration occurred was "the key factual question to be litigated at trial," and that the other issues presented disputed legal questions.

indicates that the agency "officially determined" that lease-by-lease accounting at Hawkins Field after January 1, 1975, was not in violation of the regulations.[10] In this respect, an "Audit Review Report," dated May 27, 1976, indicates that since the agency had rescinded "that part of Ruling 1975-15 which specifically stated that units were to be treated as one property," a "potential violation amount has not been calculated and Hawkins Field has been eliminated from our report as a potential violation." However, once the audit of Exxon had been completed, a Notice of Probable Violation was issued on January 10, 1978, focused upon "Exxon's activities as operator of the Hawkins Field Unit . . . during the period September 1, 1973, through December 31, 1976. . . ."

The preliminary report of field auditors can not be raised as an official, binding and final agency position upon the question of what constitutes a "significant alteration in producing patterns," or a determination of when such alteration occurred at Hawkins Field. See *Johnson Oil Co., Inc. v. U. S. Dept. of Energy*, 690 F.2d 191, 202 (TECA 1982), holding that a proposed remedial order following audit was not an official agency position, and *United States v. Fitch Oil Co.*, 676 F.2d 673, 677 (TECA 1982), ruling that audit policies intended to govern internal agency procedures are not binding on the Department of Energy.

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[10] In the trial court Exxon claimed that the decision to unitize Hawkins Field, and the decision to maintain lease-by-lease accounting, were made in reasonable reliance "on repeated agency assurances to Exxon and others that such practices were allowable under the regulations."

The trial court found that the estoppel defense failed because "the undisputed facts in this case demonstrate that Exxon's reliance, if any, on unauthorized informal statements by agency employees, was not reasonable." 561 F.Supp. at 845.

D. *Ruling 1977-2: Application of Section 212.75 to Hawkins Field.*

As noted, in January, 1977, the agency determined in Ruling 1977-2 that the definition of "significant alteration" found in Section 212.75 would be used as "guidance" in audits and compliance cases involving units which were formed before February, 1976, which were otherwise subject to the provisions of Section 212.72.

After reviewing the Record, and the administrative history of the Ruling, we determine that the District Court properly applied Ruling 1977-2 in allowing Exxon, as Unit Operator, to delay establishing a single BPCL until a significant alteration occurred at Hawkins Field.[11] We further find that the trial court properly determined that question according to the definition of significant alteration found in Section 212.75.[12]

The purpose of Ruling 1977-2 was to clear up certain "technical issues" which had arisen in connection with the agency's implementation of the new crude oil pricing

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[11] "A unit base production control level must in general be established as of the effective date of unitization, and the producer must treat the unit as a single property. Section 212.75 provides an exception to this requirement where . . . 2) the unitized property has not sustained a significant alteration in producing patterns . . ." 42 Fed. Reg. at p. 4414.

[12] "Section 212.75, adopted on February 1, 1976, is applicable only to enhanced recovery unitized properties which established a unit BPCL on or after February 1, 1976." Since Section 212.75 did not contain a definition of "significant alteration" until September 1, 1976, enhanced recovery units formed during that time period were permitted to continue lease-by-lease accounting until such time as enhanced recovery operations had begun. As to these units, the definition adopted in the August 20 Notice was not applicable *until* September 1, 1976, even though the alteration occurred prior to September 1, 1976. 42 Fed. Reg. at p. 4415.

policies set out in the EPCA, and to clarify the August 20, 1976 Notice regarding price regulations applicable to crude oil. These clarifications, of course, were designed to improve the incentives offered under the two tier pricing system. 42 Fed. Reg. at 4409.

The agency summarized separate treatments to be afforded three different types of Units, according to the date upon which each became unitized, and/or when significantly altered producing patterns occurred on the property.

The comments of the District Court upon the purposes and effect of Ruling 1977-2 succinctly sum up its provisions, 561 F.Supp., f.n. 33, at pp. 837-838:

> "Although Ruling 1977-2 is not a model of clarity, three categories of units may be distilled from it. The first category consisted of all units formed before February 1, 1976, and at which enhanced recovery operations or a significant alteration in producing patterns occurred *before* September 1, 1976. . . . (At these units) a unit BPCL had to be established as of the date the significant alteration in producing patterns occurred. *Only Section 212.72 applied to these units.* . . .
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> "The second category consisted of all units, whenever formed, at which a significant alteration in producing patterns occurred only *after* August 31, 1976. At units in this second category, as well, a unit BPCL had to be established as of the date the significant alteration in producing patterns occurred, but such units enjoyed all the benefits of Section 212.75 . . . .
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> "The third category consisted of units formed between February 1, 1976 and August 31, 1976 and at which either enhanced recovery operations began, or a significant alteration in producing patterns occurred, *prior to* September 1, 1976. The agency defined 'enhanced recovery' in February 1976 to include gas or liquid injection operations. 41 Fed.

Reg. at 4941. The definition of significant alteration in producing patterns, which came only as of September 1, 1976, swallowed up the concept of enhanced recovery, because the new definition included 'the application of extraneous energy sources by the injection of liquids or gases into the reservoir.' . . . The agency recognized, however, that producing patterns might be altered before gas injection, and so added as an alternative definition of significant alteration 'the increase of production allowables for any property that constitutes the unitized property.' . . . .

"Because operators of units in this third category, formed after February 1, 1976, knew the definition of enhanced recovery when their units were formed, whereas 'significant alteration' was defined only in September, the agency chose to apply the two concepts differently. Operators of units at which enhanced recovery operations began before September 1, 1976 were required to establish a unit BPCL as of the date such operations began . . . But operators of units at which no enhanced recovery operations began, but where a significant alteration in producing patterns occurred, before September 1, 1976, were allowed to wait until September 1, 1976 to establish a unit BPCL. . . .

"As a practical matter this meant that if an operator began gas or liquid injection—which would constitute both enhanced recovery and a significant alteration—the operator had to establish a unit BPCL as of that date. If there occurred only a shift in production allowables—which would constitute a significant alteration but not enhanced recovery—the operator could wait until September 1, 1976 to establish a unit BPCL." (Emphasis supplied.)

Ruling 1977-2 provided that as to the third category of units, once a unit BPCL was established, "the provisions of Section 212.75 then in effect are applicable. . . ." 42 Fed. Reg. at 4415. As noted by the trial court, "such

units were not allowed any measure of imputed new oil, but they were allowed to use the special unit BPCL rule and the provisions for imputed stripper well oil." 561 F.Supp., f.n. 33 at p. 838.

Exxon claims that 10 CFR Section 212.75 may not be retroactively applied because standards for retroactivity have not been met. It claims that retroactive application of only "selected portions" of Section 212.75 is arbitrary and capricious because this creates discriminatory treatment of unitized fields, and irrationally treats "similarly situated" parties in a dissimilar manner. Finally Exxon argues that if the "significant alteration" portion of Section 212.75 is to be applied retroactively, then the beneficial portions of Section 212.75 must also be given retroactive effect.

After fully reviewing the record, we determine that the District Court correctly applied Section 212.75 in holding that a single BPCL must be adopted at the Hawkins Field in January, 1975, when it was unitized, because a significant alteration in producing patterns occurred at that time.

In the first instance, we reiterate the fact that this Court has previously determined that Section 212.72 in and of itself, required that a single BPCL be established upon unitization.

Secondly, and as found by the trial court, the agency, in rescinding the strict unit-property rule established by Ruling 1975-15, established "a completely new, although less strict, interpretation of the property definition in Section 212.72." 561 F.Supp. at 816.

Finally, and as the trial court found, Exxon suffered no prejudice or injury from substitution of the Section 212.75 test for the requirement of Ruling 1975-15 that a unit BPCL be established as of the legally effective date of the unitization agreement. Application of Section 212.75 as "guidance" to the question of significant alter-

ation would not be more restrictive than the new February, 1976 announcement which allowed a producer to postpone unit accounting until production patterns had been significantly altered, which occurred generally upon implementation of "enhanced recovery techniques," or earlier, upon the closing-in of wells and transfer of production to other leases in preparation for enhanced recovery operations. Certainly Exxon can not claim prejudice through reliance upon any "general test" contained in the 1976 announcement, for its decision to unitize and to account upon a lease-by-lease basis was made in 1974, with full knowledge that Section 212.72, unaided by Ruling 1975-15, required unit wide accounting upon unitization.[13]

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[13] As noted, unit accounting had been adopted by Exxon for other Units.

PX 56, an Exxon Memo dated 2/7/74 concerned pricing policy for the Hawkins Unit:

> ". . . it is recommended that Exxon should begin calculating exempted unit oil on a lease basis rather than on a total field basis. These changes would prevent an 80 percent reduction in new and released oil when Hawkins is unitized . . . ."

PX 77, an Exxon Memo dated 8/8/74, noted that unit accounting was established in two other fields, unitized on September 1, 1973, the date that two-tier pricing went into effect, and on March 1, 1974. However, in the Hawkins Field, Exxon:

> ". . . proposed that the calculation of new and released oil be on the basis that each pre-unitization accounting lease is a separate 'property' for FEA purposes. A calculation based on the total unit would result in less new and released oil than if the field had not been unitized. . . ."

In drawing a distinction between the two other units (using unit accounting), this memo noted:

> "Hawkins unitization differs from Jay and Webster in that a large number of royalty owners have not signed up for the unit."

At that time over 75% of the 327 unit tracts in Hawkins Field had less than 100% royalty approval.

Exxon next asserts that it will sustain prejudice if the Section 212.75 significant alteration test is applied retroactively because the Hawkins Field would never have been unitized if the participants had known that unit-wide accounting would be required upon unitization, since many participants would lose "new oil" which they were legitimately getting prior to unitization, under lease by lease accounting. Such after-the-fact speculation is not persuasive.

The record establishes that Exxon was well aware that Section 212.72 required adoption of unit-wide accounting upon unitization, and that this requirement was a problem to Exxon in its effort to convince all participants to join the unit. At the same time, Exxon clearly feared that *all* "new oil" would be lost because the increased MER (Maximum Efficient Rate) for the field, which had been raised by the Texas Railroad Commission, in prospect of the unitization, would be reduced to its former level if Exxon's plan for unitization fell through.[14] This threat had been raised by "a number of smaller, edge operators in the field" who believed that the field MER of 112,000 barrels per day was too high. A State Hearing Examiner believed that the 1974 producing rate in the field was damaging the reservoir. In May, 1974,

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[14] PX 54 discusses the MER aspect in this manner:

> "One of our biggest problems in the unitization was that the entire project has been conducted on a highly accelerated basis, because Exxon has so much at stake .... As part of an interim pressure maintenance program Exxon got the Railroad Commission to increase the field allowance by 25,000 barrels a day. While this has increased the Company's current income considerably, the increased production is causing edge tracts in the field to deplete faster. The owners of these tracts have been threatening to ask the Railroad Commission to remove the increased allowable. Exxon has succeeded in holding this off by showing its good faith effort to get the unitization under way as soon as possible .... the unit has to be made effective within two years or all the past effort will be lost."

Exxon was concerned that the Texas Commission might reduce the MER rate of 112,000 barrels per day to 87,000. In a presentation to management in July, 1974, Exxon employees emphasized "the critical need for operation flexibility," with "substantial changes from current producing practices" so that the Hawkins Field allowable would be produced from "the more capable" wells. The possibility of a reduction in the MER for the field by 25,000 barrels per day was specifically feared if unit approval was delayed past January 1, 1975. Since Exxon owned 76% of the working interest, 19,000 barrels of this loss would fall on Exxon's interest in the field. An Exxon budget summary in November, 1974,[15] "assumed" that the Hawkins Field allowable would be cut from 112,000 to 87,000 B/D on July 1, 1975, if the field was not unitized because "(p)olitical pressure from other operators would force the Texas Railroad Commission to reduce the field rate."

Under these circumstances, there was no prejudice to Exxon which would prohibit retroactive application of the significant alteration tests of Section 212.75 as guidance in a determination of the question at Hawkins Field.

We further find that Exxon is not entitled to the beneficial "special incentives" of Section 212.75, which, by its terms applies only to certain classes of units, not including HFU. Exxon claims that it was arbitrary to discriminate between those units formed before February 1976, and those formed between February and September 1976.[16]

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[15] The summary noted that Exxon's working interest in the Unit was 79.52% until about the second quarter of 1977 when it would drop to 75.97%. PX 92. Exxon owned about 77.8% of the field allowable.

[16] The District Court rejected Exxon's claim to retroactive benefits of Section 212.75. 561 F.Supp., at 837, n. 33. Exxon does not now claim on appeal that it is entitled to an amount of "new" and "stripper well" oil from Hawkins Field be-

The District Court recognized the disparity in treatment with these comments: (561 F.Supp. f.n. 35 at p. 839):

> "The agency articulated no reasons for acting so generously towards such units when its stated purpose was only to encourage prospective unitization . . . . One might speculate that because such units had not yet undergone a significant alteration in producing patterns, they faced a greater risk of dissolution than did units where significant and perhaps irreversible alteration had already occurred. The agency may have wished to provide particular incentives for the maintenance of such units by holding out the prospect of greater rewards. But whatever the agency's reasons, the issue of the reasonableness of extending the benefits of Section 212.75 to some units formed before February 1976 is not before the court. Even if it were, the court could at most strike down that small portion of Section 212.75 as an unjustifiable windfall to pre-existing units. *That decision would not affect the validity of the agency's decision to provide incentives for the creation of new units while denying those incentives to pre-existing units like the Hawkins Field Unit.* (Emphasis supplied).

Regardless of the generous treatment given to some newly formed units, the trial court determined that the agency need not give the benefits of Section 212.75 to those pre-existing units subject to the provisions of Section 212.72, since by refusing to extend greater benefits, "the agency performed precisely the delicate weighing of competing statutory objectives with which Congress had entrusted it and to which judicial deference is due." 561 F.Supp. at 839-840. We agree with the court's conclusion, found at 838-839 of 561 F.Supp.:

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ginning in September, 1976, on account of the provisions of Section 212.75.

> "Working within the narrow constraints imposed by Congress, the FEA reasonably balanced the competing aims of increased production and price control by extending the most favorable incentives to new units. Indeed, the FEA could not have treated all units alike, whenever formed. Had the FEA allowed all units, including the Hawkins Field, to benefit from the favorable provisions of Section 212.75, it would have violated the EPCA directive that no old oil be reclassified as higher-price oil unless it would not have otherwise been produced. The owners of the properties . . . . such as the Hawkins Field Unit made their economic decision to unitize and to pursue enhanced recovery efforts long before February 1976. Any further inducement to them would have produced no additional oil that they had not already decided was worth producing. They could not be encouraged to do what they had already done. . . ."

It clearly appears that HFU, a pre-February 1976 unit which was subject to Section 212.72, was not "similarly situated" to units created later in response to new incentives for enhanced recovery operations. There was no arbitrary discrimination between two types of units which would entitle Exxon to claim any sort of prejudice from its treatment under Section 212.75.[17]

E. *The "Significant Alteration" at Hawkins Field.*

Following a review of the record, we find that the trial court correctly held, as a matter of law, that a sig-

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[17] The trial court noted that even if extending benefits to a few units formed before February 1976 could be said to be "unfair," the most it could do was to strike down a small portion of Section 212.75 as "an unjustifiable windfall to pre-existing units." On appeal, Exxon claims that the solution to such "unfairness" would be to extend the benefits to Exxon, and not to take them away from other units. Such argument is without merit. This court will not rewrite the regulations to fit Exxon's situation. It was not similarly situated to the units which were given favorable treatment.

nificant alteration in producing patterns occurred at Hawkins Field in January, 1975, and that Exxon was required to establish a unit BPCL at that time.

On the cross-motions for summary judgment, the Government filed its statement of material facts as to which there was no dispute, and Exxon filed its statement of "genuine issues," to be litigated at trial. The Government's statement was based upon Exxon's admissions and answers to interrogatories, transcripts and documents connected with Texas Railroad Commission proceedings, Exxon's own undisputed production, allowable and injection data from the Hawkins Field, and other contemporary documents relating to planning, production, and pricing for the unit.

Exxon, in its statement of issues to be litigated at trial, did not, and does not, on this appeal contest these facts. Instead, the argument is made that since the agency intended that the Section 212.75 definition of substantial alteration be used only as "guidance," in "flexible case by case determinations," an evidentiary hearing was required to determine the alteration question at Hawkins Field. In this respect, it is Exxon's claim that the deposition testimony of thirteen petroleum engineers refutes any conclusion that gas injection and realignment of production at the unit amounted to significant change in production methods at Hawkins Field. In Exxon's opinion, such testimony would establish that operations in January 1975 "were just a continuation of the temporary 'holding action' " that began at the Hawkins Field in 1969 to combat the waste of crude oil. According to Exxon, producing patterns in the field could not have been significantly altered until the inert gas plant began operations in March, 1977.[18]

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[18] Exxon, of course, has previously determined that unit-wide accounting was required at Hawkins Field as of *September 1, 1976.*

1. *The Assignment of a Unit Allowable.* One of the definitions of "significant alteration" used as guidance by the trial court in determining the status of Hawkins Field under Ruling 1977-2 and Section 212.75, was the question of when there occurred at Hawkins Field an "increase of production allowables for any property that constitutes the unitized property."

Upon the basis of uncontradicted evidence, the trial court found that the state designated unit allowable assigned to the field in January 1975 was a significant alteration in producing patterns within the contemplation of Section 212.75. As explained by the trial court at p. 843, 561 F.Supp.:

> "Prior to unitization the Texas Railroad Commission . . . limited the number of barrels of oil . . . each well within the Hawkins Field could produce. When a producer-shut in an unproductive well . . . that well's allowables were transferred pro rata among all the other wells in the field. In its order approving the unitization of the Hawkins Field, the (Commission) granted the field a unit allowable and in doing so relinquished to Exxon the control of allocating production among the properties comprising the unit. . . . The unit allowable permitted Exxon to transfer production from lease to lease at will, without regard to prior limits on production at any lease, provided total unit production did not exceed the unit allowable. In effect, therefore the (Commission) accorded Exxon as of January 1, 1975 an increase in production allowables for any property within the Hawkins Field Unit to which Exxon chose to transfer production, and thereby triggered a significant alteration in producing patterns as of January 1, 1975." [19]

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[19] The Order of the Texas Railroad Commission, dated November 26, 1974, approving the unitization agreement for Hawkins Field, provided in pertinent part that:

> "It is further ordered that the proration units as established for the individual wells, within the unitized area,

The evidence established that Exxon immediately used the unit allowable in January 1975 by raising production above prior allowables by nearly 320,000 barrels at 65 leases, while production declined in an equal amount at 137 other leases. As found by the trial court—"(b)y shifting production within the unit at will, with only an eye to the unit allowable limit, Exxon effectively 'transfer(red) production allowables among participating leases.'" 561 F.Supp. at 844. This, of necessity, resulted in substantial increases in "new" oil, without any actual increase in total production from the field. Prior to unitization, it was not possible for an Operator to increase production by transferring allowables from one particular lease to another, because if one well became incapable of producing its allowable, any shortfall was assigned by the state Commission to all capable wells in the field, pro rata. PX 5 at Rule 15.

Exxon does not dispute the evidence establishing this transfer of production among leases.[20] Instead, it claims

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prior to the approval of the subject Unitization Agreement, are hereby adopted, approved and continued in effect for allowable allocation purposes for such wells, unless the unit Operator elects to revise such proration units."

When Exxon petitioned the Commission to approve the unitization, it requested a single unit production allowable for "operating flexibility" so that allowables could be transferred among tracts of Exxon's choice. PX 86.

[20] The District Court found that by Exxon's own measurements, "almost 20 percent of 1975 production had shifted across lease lines, almost two and one-half times as much as had shifted in either 1974 or 1973." 561 F.Supp. at 844, n. 42. Despite Exxon's claim in this appeal that this finding was incorrect, the record supports the finding. See PX 200 at 2.

In January, 1975 the M. A. Kay Estate lease produced 47,531 more barrels than it had been allowed to produce on the average in any month during 1974. This was a 33.3% increase in production in that one lease. All of these barrels

that in an MER field, such as Hawkins, the "increase in allowables" portion of the "significant alteration" definition, should be construed to mean an increase in the *unit allowable*. From this proposition, Exxon then argues that since the unit allowable was the same as the pre-unitization MER for the entire field, there was no "increase in allowables."

The definition of what constitutes a "significant alteration in producing patterns" is to be applied as guidance to "all unitized properties" required to establish a unit BPCL prior to February 1, 1976. There is no exception made for units formed at MER fields, or for Exxon's particular circumstances. The preamble to the significant alteration definition of Section 212.75 includes the following language:

> "The (significant alteration in producing patterns) exception provides that notwithstanding the requirement to adopt a unitized BPCL as of the effective date of unitization, determinations of upper and lower tier crude oil volumes may continue to be made separately for properties that comprise the unit . . . only for as long as (1) injection has not begun, and (2) *there has been no transfer of production allowables among participating leases.*" 41 Fed. Reg. at 36182, Reg. APX p. 278. (Emphasis supplied).

In *Wiggins Bros., Inc. v. Department of Energy*, 667 F.2d 77, 88, (TECA 1981), *cert. denied*, 456 U.S. 905 (1982), we noted that the District Court was not free to disregard the intention of the agency which was expressed in a preamble to Ruling 1974-29. We there stated:

> "It is well settled by decisions of this Court that the preamble to a regulation of DOE and its prede-

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were treated as "new oil" under Exxon's lease-by-lease accounting. See Appendices B-1, D, "Charts and Graphs."

It is clear that such shifts of production across lease lines were the result of unitization.

> cessors should be considered in construing the regulation and determining the meaning of the regulation. . . .
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> * * *
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> Further, there is no support for the view that, under federal rules of construction of statutes and legislative regulations, definitions in a preamble may be ignored. The rule is contrary to this view."

Exxon's rewriting of Section 212.75 would eliminate the phrase "any property that constitutes" from that section, and require the Court to find that a significant alteration occurs only when there is an "increase in production allowables for . . . the unitized property."[21] Such construction would ignore the clear language of Section 212.75 itself, as well as the manifest intent of the agency as expressed in the preamble to the amendment of Section 212.75, 41 Fed. Reg. 36,182.

The District Court correctly looked to agency intent, as expressed by the language of the regulation and its preamble, for the appropriate explanation of the term "increase of production allowables for any property that constitutes the unitized property." This term clearly includes a "transfer of production allowables among participating leases." Exxon did in fact so transfer production allowables in January 1975.[22]

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[21] The definition of "significant alteration in producing patterns" set out in the amendment to Section 212.75, effective September 1, 1976, provided in pertinent part that the term meant:

> ". . . . (2) the increase of production allowables *for any property that constitutes* the unitized property." (Emphasis supplied.) 41 Fed. Reg. at 36184.

[22] This was contemporaneously understood by an Exxon employee upon review of the August 1976 regulations. His conclusion was that the language contained in the preamble would be of no benefit to Hawkins Field "because of the transfer of allowable provisions" so that Hawkins would be required to begin unit calculations on February 1, 1975 with

2. *Gas Injection at Hawkins Field.* The second definition of "significant alteration" provided by Section 212.75, and used as guidance by the trial court in determining the status of Hawkins Field, concerns the injection of gas in and after January, 1975. The trial court found that:

> ". . . after unitization Exxon continued—and increased—the injections of natural gas it had begun in 1970. Even if Exxon had only continued to inject natural gas at the rate it had done so before unitization—or even some lesser rate—it would have engaged in 'the application of extraneous energy sources by the injection of liquids or gases into the reservoir'—itself a significant alteration in producing patterns. . . . But Exxon in fact substantially increased gas injection after unitization." 561 F.Supp. at 844.

While the Railroad Commission had initially authorized injection of gas at an average of 20 million cubic feet per day in 1969 as a part of Exxon's "interim plan" in preparing for unitization, this limit was removed by the Commission upon unitization. The trial court summed up the uncontested data from Exxon files, in this manner:

> ". . . Exxon injected 28.2 mcf per day in January 1975—40 percent more than a year earlier. PX 177. Indeed, Exxon increased injections thereafter until by the fall of 1975 it was injecting more than twice as much gas as a year before . . . . Over all, in the first ten months of 1975 Exxon injected an average of 36.5 mcf per day—almost an eighty percent increase over the same period in 1974 . . . Comparing totals for the years 1972 through 1975 reveals the same clear jump after unitization. Although between 1972 and 1975 increases averaged only 5 percent annually, total gas injections at the Hawkins Field in 1975 leaped 82 percent, . . . with the 1975

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a consequence being "about a $70MM retroactive exposure for Exxon." PX 230 at 4.

total more than double the amount for 1972. . . ." 561 F.Supp at pp. 844-845.[23]

In response to this uncontroverted evidence, Exxon first claims that the 1975 injection program was merely a "continuation of the interim project," and therefore there was no significant alteration in producing patterns. The evidence cited above is to the contrary.

Exxon next claims that the district court erred in making post-unitization comparisons because pre-unitization gas injection in the eastern part of Hawkins Field was omitted. The record discloses that in 1974 Texaco and Amoco were the only operators injecting gas in the eastern portion of Hawkins Field. This injection was not to maintain pressure in the gas cap, but was for the purpose of regulating proportions of gas to oil in some wells. Even if the small amount of gas injected in the eastern field is added to Exxon's injections in the western segment, the undisputed evidence is that post-unitization injection continued a dramatic climb above 1974 rates.

Exxon next claims that the gas injected at Hawkins Field was not from an "extraneous" energy source.[24] According to Exxon, the definition of "extraneous" means "gas not produced from the subject reservoir." Since the gas injected at Hawkins was "entirely from the field reservoir," Exxon insists that there could be no substantial alteration in production patterns at the Hawkins Unit.

The District Court correctly rejected this argument, citing the preamble to the February 1976 amendments, in which it was explained that the term "extraneous"

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[23] These figures come from data submitted by Exxon to the Texas Commission on December 18, 1975.

[24] As previously noted, one of the alternative tests for "significant alteration" in the September 1976 definition, used as guidance here, was "the application of extraneous energy sources by the injection of liquids or gases into the reservoir." 10 C.F.R. Section 212.75(b).

included gas recycled from the reservoir. 561 F.Supp. at 844, f.n. 43. That preamble provided, in pertinent part, that

> "In response to the proposed definition, many comments expressed concern that the language 'from extraneous sources' might preclude some types of enhanced recovery projects that recycle reservoir gas . . . . *The fact that the injected fluids or gases may have originated in the reservoir is irrelevant as long as they are injected by an extraneous energy source.*" 41 Fed. Reg. at 4938, R. 37585. (Emphasis supplied).

As previously noted, the definition contained in this preamble has controlling weight. See *Wiggins Bros., Inc. v. DOE, supra*, 667 F.2d 77.

Exxon further argues that the explanation of "extraneous energy source" is somehow inapplicable, since it was intended to apply only to "enhanced recovery projects," where the injected gas would "move crude oil through the reservoir." In this respect, Exxon claims that "the continuation of the interim program at the HFU in 1975 was *not* an enhanced recovery project." Exxon brief, p. 72. Such a claim at this stage of the proceedings is startling, and without merit. In its "Statement of Material Facts," Exxon asserted that "The Hawkins Field Unit Agreement, . . . as approved by the TRRC, authorized the establishment and operation of the unit facilities necessary for enhanced recovery operations in the Hawkins Field." Various Government exhibits establish that Exxon admitted that gas injection at the Hawkins Field Unit was an enhanced recovery operation.[25]

Since the undisputed evidence established that gas injection occurred in January 1975, the trial court correctly found that a significant alteration in producing patterns at HFU occurred at that time.

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[25] PX 68, PX 94, PX 103, PX 109, etc.

F. *The "Reasonable Alternative Basis" of Ruling 1977-2.* After having determined that a significant alteration in producing patterns occurred at HFU in January, 1975, under both the test of an "increase in production allowables," and/or by gas injection at the field, the trial court further determined that Exxon had failed to justify another date upon some other "reasonable basis," as allowed by Ruling 1977-2.[26]

Exxon argued that "the only truly significant alteration that occurred in the producing patterns of the Field after unitization was the permanent arrest of gas cap shrinkage and the conversion of the reservoir drive mechanism to gas drive/gravity drainage." The trial court approached the issue from this position, and determined that any alternative date which depended on lengthy testimony by expert petroleum engineers as to underground drive mechanisms was not within the intent of Congress since compliance with pricing regulations should be based upon simple objective data, readily observable by agency auditors.[27] The Court further held that since substantial shifts in production had occurred prior to any change in underground drive mechanisms, lease-by-lease accounting thereafter would have allowed Exxon to effectively avoid price controls:

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[26] In extensive briefing, Exxon claims that the trial court refused to allow it to justify an alternative date for "significant alteration of producing patterns" at Hawkins Field.

The defense was not raised in Exxon's Answer or Amended Answer, but it was raised as an "issue" to be litigated in its "Statement of Genuine Issues" to be litigated at trial.

While the trial court noted that the question was not before it, the issue was in fact considered and determined adversely to Exxon.

[27] Exxon contended that no significant alteration occurred at Hawkins Field "until the injection of inert gas stabilized reservoir pressure and altered the reservoir's underground drive mechanisms, *sometime in 1979.*" 561 F.Supp. at 840. (Emphasis supplied.)

". . . the agency's decision to define significant alteration in producing patterns in terms of easily observable events is consistent with the intent of Congress that administration of price controls be workable and effective. The FEA with its limited resources could not afford to satisfy Exxon's desire that the agency send droves of petroleum engineers to the Hawkins Field to conduct elaborate tests to examine the field's underground drive mechanism. That is precisely the 'quagmire' that the agency had to avoid . . . ." 561 F.Supp. at 841.

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"To allow lease by lease accounting to continue after such shifts would have enabled unit operators to circumvent oil price controls. To require the agency to adopt a subjective test based on complex geological phenomena would have plunged the agency into an administrative quagmire which would have had the same result. The agency definition of significant alteration was a reasonable effort by the agency to fulfill its 'duty to reasonably inhibit gerrymandering of boundaries undertaken to avoid price controls.' *Pennzoil Co. v. DOE, supra,* 680 F.2d at 169. Accordingly it must be upheld." 561 F.Supp. 843.

On this appeal, Exxon now claims that *March, 1977,*[28] the month the gas plant began operation, is a reasonable alternative date, although its own records show that it calculated a unit BPCL in September, 1976 upon its own finding that a significant alteration had already occurred.

We reject this argument for two reasons. First, and of most importance, any meaningful comparison of production levels between "old" and "new" oil on a lease-by-lease basis became impossible once production across lease lines began in January, 1975. Any date based upon completion of and operation of the gas plant in 1977

[28] Exxon continues to shift ground, and refine its arguments in this appeal. As previously noted, the alternative date presented to the trial court was "sometime in 1979."

would not be a reasonable alternative date for determining the question of when a significant alteration in producing patterns occurred at Hawkins Field.

This Court has previously recognized that:

> "The realignment of the pattern of production would have played havoc with the federal pricing system had FEA permitted lease by lease property designations to continue in force after a unitization. It would have resulted in the recognition of artificially high quantities of new oil from some of the participating leases while other leases would be producing less or not at all. It would have permitted an operator to gerrymander production patterns by shifting producing wells from one lease to another." *Department of Energy v. State of Louisiana*, 690 F.2d 180 at 190 (TECA 1982), *cert. den.*, 460 U.S. 1069 (1983).

See also, *Pennzoil, supra*, 680 F.2d at 169; *Grigsby, supra*, 585 F.2d at 1083.

We will not reiterate the evidence recited by the trial court concerning the shutting in of wells, and transfer of production from one lease to another following unitization of Hawkins Field. Exxon personnel, in a report dated June, 1975, attributed the increased volumes of "new oil" directly to unitization. This conclusion was repeated in various Exxon documents.

The Court is satisfied that given the extent and nature of the changes in Exxon production methods once unitization had been accomplished, it became impossible to make any meaningful comparison of "new oil" production on a lease-by-lease basis, long before the commencement of inert gas injection in March 1977. Therefore, no reasonable basis exists for making that occurrence an alternative date for computation of a BPCL at Hawkins Field.

In addition, we fully agree with the trial court's conclusion that any resort to the testimony of expert petro-

leum engineers for the purpose of determining a reasonable alternative date for a significant alteration in production methods at Hawkins Field would be unworkable, and therefore, not a reasonable basis for determination of the question. Such a method of ascertaining the question would be completely impossible to "audit." We believe that the "key event," as found by the trial court, was the "realignment of producing patterns" among the various leases.

The determination of *when* the significant alteration occurred at Hawkins Field was correctly determined by the trial court, as a matter of law.

IX. THE EXTENT OF EXXON LIABILITY

The District Court, relying upon our decision in *Sauder v. Department of Energy, supra,* 648 F.2d 1341, determined, on the basis of undisputed testimony, and Exxon's own documents, that since Exxon caused the overcharges, it is fully liable for all of them.

In this appeal, Exxon contends that the principle of operator liability set out in *Sauder* does not apply. In addition, Exxon advances other arguments for the proposition that in any event it should be relieved of certain portions of the overcharges and interest.

We first review the *Sauder* case.

A. *The Sauder Rationale: Operator Liability.*

In *Sauder*, the Operator owned 34 percent and 41 percent interests in two properties where exempt stripper well oil was wrongfully claimed. We held that he was liable for all overcharges attributable to the two leases, even though other interest owners had in fact received the majority of the profits.[29] We held that:

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[29] In *Sauder* the total overcharges amounted to $342,589, plus interest. Sauder claimed that he was liable only for $133,000, his share of the total.

"Of all the working interest owners, (Sauder's) is by far the largest single holding. He is the sole operator of the leases and has been the animating force behind the continued production at the Bradfield Pool . . . . It can fairly be said that it was he who caused the overcharges.

In these circumstances, we think that it is within the authority and discretion of the agency to hold the owner-operator of a lease liable for the full amount of the overcharge. To require the agency to seek refunds from each individual property owner would place a heavy burden on the agency, limiting its ability to repair infractions of its pricing rules. Shifting the burden to one in Sauder's position of responsibility aids the task of enforcement without working unfairness." (648 F.2d at 1347-48)

In applying *Sauder* to the Hawkins Field situation, the trial court summed up Exxon's situation in this manner:

". . . Disputing its role as the animating force at the Hawkins Field, Exxon argues that under the terms of the Unit Agreement each Hawkins Field interest owner takes its share of production in kind and independently determines the price at which to sell the oil. Exxon's description of itself as just another interest owner is disingenuous. Exxon was the prime mover and animating force behind the formation and operation of the Hawkins Field Unit and, under the rule of *Sauder* . . . Exxon may be held responsible for all overcharges at the field." 561 F.Supp. at 849.

The trial court emphasized that:

"The factual basis for holding Exxon responsible for the full amount of the overcharges at the Hawkins Field is even stronger than in *Sauder*. Throughout the relevant period Exxon's working interest at Hawkins ranged between 76 and 80 percent; its share of unit production, when including royalty interest owners, was about two-thirds. . . .

> Exxon was the animating force behind formation of the Hawkins Field Unit, having begun to promote it as early as 1969. . . . Exxon sought and received permission in 1969 to inject natural gas into the field, which it began the following year. . . . As operator, Exxon chose the wells to shut-in, the wells where production was to go up or down, where to inject gas, and how much. . . . Most important, Exxon decided how the unit would account for upper and lower tier oil, first in 1974, before the field was legally unitized . . . later after Ruling 1975-15 was issued, . . . and finally when it switched to a unit BPCL under Section 212.75 in September 1976. . . . Accordingly, Exxon may 'fairly be said (to have) caused the overcharges.' *Sauder v. DOE* . . . ." 561 F.Supp. at 849-850.

The undisputed evidence, so ably summarized by the trial court, supports the conclusion that Exxon is responsible for all of the overcharges under the rationale of *Sauder*. To require the Government to gather evidence and to bring multiple actions against more than 200 working interest owners, and 2200 royalty interest owners at Hawkins Field would "plunge the agency into an 'administrative quagmire' which would effectively block enforcement of oil price controls at the Hawkins Field." 516 F.Supp. at 850.

In this appeal Exxon now takes the position that it cannot be liable for various portions of the liability because it was acting merely as the *agent* of other interest owners, and the trial court failed to determine first that Exxon would be entitled to contribution or indemnification from all other owners who benefited from the overcharges.

While Exxon did not raise the "agency" issue as such in the summary judgment proceedings, and the issue was not specifically discussed by the trial court at 516 F. Supp., Exxon has always resisted the suggestion that it is liable as unit operator for the sales of other interest owners in the Hawkins Field. When Exxon earlier dis-

claimed its liability as an operator by means of a motion to have this case dismissed for lack of indispensable parties, contending that the rights of other interest owners were at issue and might be adversely affected because they would be liable for contribution and indemnification should Exxon be found liable, the trial court fully examined the nature of Exxon's liability as operator under the *Sauder* ruling, and discussed the question of Exxon's right to contribution or indemnification from other owners in the field. *United States v. Exxon Corp., supra,* 94 F.R.D. 252, 257-258, (1981) :

> "As long as the principal owner-operator caused the overcharges, *Sauder* allows complete recovery from that party, regardless of whether it is actually in possession of the monies received pursuant to the overcharges.
>
> "Similarly, under Rule 19(a)(2)(i), the court's analysis of *Sauder* means that the interests of other unit owners in this case will not, as a practical matter, be impeded. *The court's ultimate disposition of the case will find Exxon liable for those overcharges which Exxon has caused; the decision will not rule upon the actions of other interest owners and, therefore, could not be employed as precedent to hold them liable in the future. That Exxon may attempt to seek indemnification or contribution from the other interest owners for part of the overcharges the court determines Exxon has been responsible for does not alter the court's conclusion.*
>
> "Such a suit by Exxon would turn upon the specific reimbursement agreements entered into by the parties, *agreements not at all at issue in the instant case.* Furthermore, if the disposition of this case has any effect upon a subsequent reimbursement suit by Exxon, it may be to *assist* (emphasis of the court) the other interest owners. A finding by the court that Exxon could be found *solely* (emphasis of the court) responsible for all overcharges could arguably aid other interest owners in defending

against a suit for contribution or indemnification." (Except as noted, emphasis supplied).

The above decision was not appealed by Exxon. It has now been found that Exxon caused the overcharges. The trial court did note that Exxon "is not without recourse against the other interest owners, and so imposing full responsibility on Exxon will aid in enforcement of price controls without unfairness to Exxon." 561 F.Supp. 850. With regard to this observation, it was noted that Exxon had twice warned other interest owners that recomputations of payments might become necessary because of its interpretation of pricing regulations,[30] and Exxon itself believed that any potential losses because of overpayment could be recovered.[31]

This notation by the trial court was not an attempt to determine the nature or extent of Exxon's right to contribution or indemnity, if any, and it certainly was

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[30] PX 145, an Exxon letter to interest owners in October, 1975, warned that these interest owners might be required "to refund excess amounts received for oil heretofore classified as 'new crude oil' which the FEA may rule does not qualify for exempt pricing."

PX 246, an Exxon letter to interest owners in January, 1978, sent after a Notice of Probable Violation was filed by the DOE, warned that if a remedial order was issued "it will probably be necessary for Exxon, pending the outcome of the controversy" to reduce payments on future production and take action "with respect to alleged past overpayments as may be necessary . . . ."

[31] Exxon's decision to proceed with lease-by-lease accounting was based in part upon its belief that it could cut its losses in this manner: (PX 172 at 2.)

> "Potential losses via overpayments of working and royalty interest owners are minimal since most of these are financially responsible parties, and all payments are backed by reserves."

not an adjudication of the rights or liabilities of absent interest owners, not parties to the litigation.[32]

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[32] Our opinion in *Exxon Corp. v. United States, supra,* 655 F.2d 1112, reviews in detail the progress of Hawkins Field litigation through the District of Columbia and the state and federal courts in Texas.

In January, 1978, a Notice of Probable Violation in Hawkins Field was issued, and Exxon and several royalty owners filed suit in the Northern District of Texas seeking declaratory relief on the same issues raised in the Notice. In June, 1978, the DOE withdrew its NOPV, and elected to proceed in this action for civil penalties and restitution under Sections 208, 209 of the ESA. Exxon's declaratory judgment action was transferred to the District of Columbia, whereupon it was dismissed by Exxon and its co-plaintiffs.

In August, 1980, Exxon moved to dismiss the D.C. action for lack of indispensable parties. The trial court held that motion in abeyance, pending the TECA decision in *Sauder*. In October, 1980, Exxon notified HFU royalty owners it would begin to withhold 40-45% of the payments due under purchase agreements to meet possible overcharge liability in the D.C. case. Exxon then filed its Counterclaim in Interpleader in the D.C. Case (discussed, infra).

Some royalty owners (known as the "*Jarvis* plaintiffs") then filed suit against Exxon in Texas state court for conversion and breach of contract. Exxon removed the case to the E.D. of Texas in November, 1980, and filed a counterclaim, joinder and third party action against the DOE, raising the same issues as those involved in the D.C. action.

Following further maneuvering by the parties, all cases were brought before the TECA for the purpose of resolving the "procedural maze". In the exercise of our supervisory powers, we ordered that litigation proceed first in the District of Columbia on the pricing and regulation issues.

We determined that the *Jarvis* plaintiffs were not indispensable parties to the D.C. litigation, but we further held that if these plaintiffs desired "an earlier determination" of their claims, they would be *permitted* to intervene in the D.C. action, and move for summary judgment. *Exxon Corp. v. United States, supra,* 655 F.2d at 1118.

None of the *Jarvis* plaintiffs intervened in the D.C. litigation to press their claims. (Brief for United States at p. 81).

The trial court only observed that "(s)hould Exxon turn to the other Hawkins Field interest owners for contribution or indemnification Exxon, like Sauder, *could attempt* to deduct the other interest owners' share of the overcharges from future royalty payments." 561 F.Supp. at 850. (Emphasis supplied). This is not to say that Exxon's attempt would be successful, or that the government must prove that it would be successful, prior to a finding that a right to restitution has been established. The Section 209 action now before us is not the vehicle for determination of Exxon's rights against, or obligations to third parties. To find otherwise would only serve to embroil the agency in collateral matters, and "hinder, disrupt, and render torpid the statutory scheme for expedited enforcement of pricing controls. [*sic*] *Dyke v. Gulf Oil Corp.*, 601 F.2d 557 at 567, (TECA 1979), *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, (TECA 1984), *cert. den.*, 105 S.Ct. 173.

For all of the reasons discussed above, we find that the trial court correctly determined that Exxon is solely liable for overcharges which it caused at the Hawkins Field Unit, and that this liability is not dependent upon a finding that Exxon is entitled to contribution for such overcharges from other interest owners in the field.

B. *The Amount of the Overcharges.*

The trial court found that the calculation of Exxon's overcharges became a straightforward accounting matter and found that the DOE calculations "accorded Exxon the benefit of every favorable modification of the applicable regulations, even if not claimed by Exxon." There was no challenge to the mathematical accuracy of the government's calculation, and the trial court accordingly accepted the figure of $895,501,163.85 as the correct total of all overcharges. 561 F.Supp. at 857.

In this appeal, Exxon contends that the amount of its liability, as described in the judgment, is "grossly overstated" for a number of reasons.

1. *The Texaco Production.* Exxon claims that it has no liability for the share of Hawkins Field production "owned, taken in kind, and refined or sold by Texaco, Inc. [*sic*] The amount of the overcharges attributable to the Texaco share is said to be $53,329,574, before interest.

The trial court correctly disposed of this contention upon the basis of our ruling in *Sauder*. 561 F.Supp. at 850, f.n. 52. In *Sauder* we relied upon *Tenneco Oil Company v. Federal Power Commission*, 442 F.2d 489 (5 Cir. 1971) in which the Court found that Tenneco was liable for all excess charges for natural gas, including payments made to its co-owners or its predecessor. We disposed of Sauder's argument that a restitution order may not require a refund of money not actually received in this manner:

> "Sauder argues that the common law concept of restitution does not encompass the restoration of benefits unjustly received by third parties, and that the agency and the court have undertaken to read a damage remedy into the statute.
>
> We disagree. . . . we now hold that it is within the agency's authority to order an owner-operator in a situation such as Sauder's to make restitution of the total overcharges." 648 F.2d at 1348, 1349.

It is entirely clear that in the case of the Texaco production, uncontested facts established that Exxon did "cause" the overcharges attributable to the Texaco interest in Hawkins Field. During the first four months of 1975, Texaco calculated the amounts of "new" and "old" oil, using a unit BPCL. Because Exxon was pricing other oil from the field upon a lease basis, it was paying larger royalties than Texaco for "new oil." As a result, some royalty owners threatened to sue Texaco. This caused Texaco to adopt Exxon's method of calculation, and to allow Exxon to determine the breakdown for Texaco's production share for the remaining period of price controls.

Exxon's claim that it is entitled to a reduction in its liability on account of the Texaco production is without merit.

2. *The Interpleader Action: Overcharges October, 1980 - January, 1981.* Exxon complains that it can not be held liable for overcharge amounts "that were never paid or received" by anyone. In this respect, Exxon claims that during the period from October, 1980, until the end of price controls on January 28, 1981, it suspended payments to those Hawkins Field interest owners from whom it purchased crude oil of all amounts in excess of a price derived from unit-wide accounting, as opposed to lease-by-lease accounting, so that during this period, Exxon paid only the price for crude oil that was permitted by the regulations under the agency's theory, and as permitted by the trial court.

With its Answer to the complaint filed by the Government in this litigation, Exxon filed a petition and counterclaim for interpleader and declaratory relief, tendering into Court "amounts equal to the disputed amounts resulting from all purchases of Unit crude oil by Exxon" pending a determination of the rights of all claimants to the disputed funds. It was noted that the owners of the crude oil were claiming that they were entitled to the full amount of the prices they had been receiving, including the portion that the DOE claimed to be overcharges. It was further noted that certain of these interest owners had sued Exxon in Texas, seeking a declaration that they were entitled to receive the full amount of the prices they had been receiving. *Exxon Corp v. United States, supra,* 655 F.2d 1112 (the *Jarvis Christian College* litigation in Texas).

In connection with this Interpleader, bonds totaling $20 million were filed to secure the suspended payments pending resolution of the controversy.

In its Reply to the Proposed Judgment, Exxon claimed that the sums bonded into Court pursuant to the Inter-

pleader action either should not be included in the overcharge amount set out in the judgment, or should be applied in partial satisfaction of the judgment. The amount of this credit or reduction in the judgment sum is said to be $18,039,585, the total of such suspended payments.

The Government responded in this manner:

> "Exxon's argument . . . that because it established a $20 million bond when it filed a questionable interpleader action, it should have its liability reduced, is difficult to fathom. In any event, Exxon's argument is premised upon the company's blatantly incorrect contention that, because the firm suspended certain payments to those HFU interest owners from whom it purchased crude oil during the period of October 1980 through January 27, 1981 'no overcharges were caused during the period covered by the interpleader action.' . . . Exxon ignores the fact that, although the company suspended certain payments to the interest owners, Exxon reported the higher illegal price to the Department's Entitlements Program as its cost of acquiring this oil . . . Hence, Exxon benefited substantially from the higher illegal price which it set and these suspended amounts constitute overcharges. . . ."

The operation of the "Entitlements Program," 10 C.F.R. Section 211.67, and its effect upon sales and certification of old and new oil in the Hawkins Field, was ably described by the trial court, 561 F.Supp. at 852:

> ". . . Exxon's portrayal of itself as victim ignores the workings of the mandatory Entitlements Program which, together with price controls on refiners, resellers and retailers, allowed Exxon to spread the cost of its Hawkins Field overcharges across the land. The purpose of the Entitlements Program was to permit all refiners to share the financial benefits of the limited available quantity of relatively inexpensive price-controlled crude oil. Under the

Entitlements Program, the FEA each month allotted to each refiner a certain number of entitlements, equal to that refiner's deemed share of the old oil refined nationwide during that month. If a refiner was in fact able to obtain and refine a proportionately large amount of low-priced old oil, greater than its allotted entitlements, that refiner would have to buy entitlements from those less fortunate refiners which refined a proportionately small amount of low-priced oil. The price of an entitlement was roughly the difference between the price of controlled and uncontrolled oil. The effect of the entitlements transfers, therefore, was to equalize the average weighted crude oil costs of all refiners.

* * * *

"As a result of Exxon's misclassification, less old oil was reported to the Entitlements Program. DOE therefore issued fewer entitlements to each refiner, and each refiner had to purchase more, or sell fewer, entitlements than it would have if Exxon had properly classified the Hawkins Field oil. Exxon, by improperly classifying old oil as new oil at the Hawkins Field, thereby increased the average cost of crude oil of all refiners. At the same time, although Exxon as refiner appeared initially to bear the burden of the overcharges of Exxon as producer, in fact Exxon was able to keep the ill-gotten gains by improving its entitlements position. It was able to buy fewer or sell more, entitlements than it had a right to."

Following our review of the record, and in consideration of the workings of the Entitlements Program, as described by the trial court, we agree with the Government's assertion that the fact that Exxon may have suspended payment of "overcharges" attributable to shares of production which it purchased from other interest owners during the period of October, 1980 to January, 1981, does not mean that there were no overcharges during that period. According to Exxon, the money was still due to be paid, and "Exxon reported (and was re-

imbursed on the basis of the higher (illegal) price when Exxon reported that oil to the Entitlements Program." Plaintiff-Appellee Brief, p. 93, f.n. 118.[33] It is clear that in this manner, overcharges attributable to Exxon's purchase of production from other interest owners although never paid to other owners during this time period, were spread throughout the industry by the operation of the Entitlements Program.

At the request of Exxon, it was excused from responding to any motions filed concerning its petition and counterclaim in Interpleader, pending further order of the Court Order, August 20, 1981. A further order was entered by the trial court on November 18, 1981 holding in abeyance all further proceedings in the interpleader action.

The Government points out that Exxon can dismiss its interpleader action at any time, and recover its bond. Exxon has not paid into court any money pursuant to this interpleader, and certainly at this time there is no cash interpleader fund available to be applied as a credit on the judgment entered in this action. Exxon is not entitled to any reduction in the amount of the judgment on account of its suspension of payments to other interest owners.

Exxon also contends that the judgment entered below improperly includes the production of some interest owners who were not parties to the Hawkins Field Unit Agreement. Our review of the record discloses that this new argument, presented by a footnote to the Exxon

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[33] Thomas Reeves, an accounting supervisor in Exxon's "Supply Controllers" Department, was responsible for certification of crude oil available for disposition through Exxon Pipeline Company, including production purchased by Exxon from others for processing at an Exxon refinery. He testified that "the higher values" would have been reported under the Entitlements Program.

brief, was not properly raised or preserved for our review on appeal.

3. *Consent Orders.* Exxon claims that it is entitled to a reduction of its liability at least in the approximate amount of $70 million because it can not be held liable for overcharges attributable to the interests of others in Hawkins Field who have previously entered into consent orders with the Department of Energy.

The consent orders in question were entered into with such companies as Mobil, Standard Oil of Indiana, Sun Company, Houston Oil and Minerals Corporation, Lyons Petroleum, American Petrofina, and Conoco.

These so-called "global settlements," such as the one entered into with Standard Oil, whose subsidiary, Amoco Production Company held an interest in Hawkins Field, contained provisions to the effect that the agency released "completely all administrative and judicial claims, demands, liabilities, causes of action or other proceedings that (DOE) has asserted or may be able to assert against Standard arising, before or after the date hereof, out of any federal petroleum price or allocation requirement," for the period covered by the consent Order. (3/6/73-12/31/79)

Exxon contends that the settlements have the effect of releasing any claims that the agency might have had against other interest owners at Hawkins Field, and that the settlements also "cured" any violations which such companies may have made in pricing "new oil" at the field. According to Exxon, such releases bar the agency's "effort to impose derivative liability" upon Exxon as the operator, and "purported agent" of the released companies. Exxon's theory of "vicarious liability" is stated in this manner:

> "The only legal basis upon which Exxon could be held liable for the alleged overcharges attributable to these interest owners' shares of HFU production

is that Exxon supposedly acted on behalf of these interest owners in the disposition of their shares of HFU production: i.e., the apparent vicarious liability that stems from the DOE's theory of operator liability. However, because these purported 'principals' have obtained releases from the DOE settling any claims that might be asserted against them, there is no basis for holding their purported 'agent' (Exxon) liable." (Exxon Reply to Proposed Judgment).

As an alternative argument, Exxon contends that the settlements, with parties who are jointly liable with Exxon, reduce the Government's "potential recovery from (a) non-settling defendant . . . ," in this case—Exxon.

It appears that the issue of consent orders was first raised by Exxon in a memorandum in support of its motion to dismiss for lack of indispensable parties filed in August, 1980. In urging that any judgment in the action could not avoid prejudice to absent parties, Exxon pointed out that the court did not "have before it the affirmative defenses of the absent interest owners." In this regard Exxon, referring to consent orders with Standard and Mobil Oil Companies, claimed that "the DOE seeks to recover from Exxon monies previously received by those interest owners and made an integral part of their settlement agreements with the agency." It was also argued that "(o)ther interest owners may have additional affirmative defenses, such as claims of estoppel and limitations, which cannot be presented in their absence."

In ruling on the motion to dismiss, the trial court, noting our order permitting the *Jarvis* plaintiffs, as well as "all other interest owners" to intervene in the District of Columbia, if they wished to do so,[34] found that the

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[34] Our Order in *Exxon Corp. v. United States, supra,* 655 F.2d 1112, at 1118, provided:

"(3) All plaintiffs in the action in the Texas court *and all other interest owners in the HFU involved in these*

other interest owners would not be prejudiced by not being joined, and further found that Rule 19(b), Fed. R. Civ. Proc., did not require dismissal of the Government's action, even if the parties should be joined under Rule 19(a). *United States v. Exxon, Corp., supra,* 94 F.R.D. at 259.[35]

Our examination of the Consent Orders contained in the Record reveals that Exxon was not a party to any

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actions shall be permitted to intervene in the District of Columbia action if they wish to do so." (Emphasis supplied.)

[35] Rule 19. Joinder of Persons Needed for Just Adjudication.

(a) Persons to be Joined if Feasible.

A person . . . whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.
* * *

(b) Determination by Court Whenever Joinder not Feasible.

If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

of the settlements, it did not pay any sum of money to the Government for release of any Exxon liability under these settlements, none of the consent orders mentions Exxon, or the Hawkins Field Unit, and, although some of the consent orders identify certain litigation terminated by the settlements, none mentions this litigation which was pending in the District of Columbia at the time the consent orders were executed. In the settlements, the Government agreed not to bring suit "against" the settling parties, and in the Conoco agreement "only civil claims by DOE against Conoco" were settled, while the Sun consent order only required the DOE to terminate actions "against Sun." None of the consent orders could, or did they, purport to release Sun, Conoco, etc., from suits by private parties for damages under Section 210 of the ESA, or for their liability to other parties, if any, for contribution, indemnification, unjust enrichment, or for other relief. Cf. *City of Long Beach v. Department of Energy*, Nos. 9-85, 9-86 (TECA 1/4/85) 754 F.2d 379.

Any rights under the consent orders accrued solely to the settling parties and not to Exxon. None of the settling parties sought to intervene in this action to assert those rights against the Government, and we do not find that Exxon has ever been given authority as agent to do so on their behalf.

It is readily apparent that Exxon's concern about settlements which may have been made by companies who are not parties to this litigation is in fact a concern about whether or not it will be successful in any future attempt to seek contribution or indemnity from those parties on account of any payment Exxon might make upon the judgment here. As we have previously pointed out, Exxon's liability is not a vicarious one, based upon ordinary notions of "agency." It has been found that Exxon was the "animating force" responsible for violating the crude oil pricing regulations, and this liability

is not dependent upon finding of "joint liability" on the part of third parties who are not defendants in this action, or upon proof of Exxon's right to contribution or indemnity from those third parties.[36]

Under these circumstances, we conclude that Exxon's claim that it is entitled to some adjustment in liability on account of consent orders and settlements made between the Government and others not parties to this case is without merit.

C. *Prejudgment Interest.*

In the exercise of its equitable powers, the trial court determined that restitution by Exxon of overcharges should be made, with interest from the date of overcharge, in order to deprive Exxon of "all enrichment obtained at the (victims') expense," such enrichment necessarily including "the benefits Exxon obtained by having the use over the years of the money illegally obtained." 561 F.Supp. at 858.

The Government proposed several alternative rates, such as the prime rate, the schedule of interest rates which had been applied by the DOE in administrative actions since February, 1980, or a rate based upon Exxon's annual average rate of return, after tax, for capital employed in domestic production from 1975-1981, which was 23.7%.

The Court adopted and applied the schedule used by the Federal Energy Regulatory Commission in adminis-

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[36] Sun Co. and Conoco have filed two suits in the District of Delaware seeking enforcement of consent orders which they entered into with the Department of Energy. *Sun Co., Inc. v. United States,* No. 83-204; *Conoco, Inc. v. United States Dept. of Energy,* No. 83-438. The Court has considered copies of preliminary orders entered in those cases which have been furnished by counsel, and determines that issues pertaining to Exxon's right of contribution, if any, from third parties are not now a subject of consideration by this Court.

trative enforcement actions, which fluctuated at three month intervals from 9% to 20.31%, and which had, since October, 1979, been based on average prime rate values as determined by the Federal Reserve. Such rates were imposed upon a finding that these would have been the rates imposed had the overcharges been assessed by Remedial Order, following administrative review, and because these rates had a reasonable relation to the value of the overcharges caused by Exxon. 561 F.Supp. at 858, 864.

For the first time in this appeal, Exxon, relying upon *Eastern Air Lines, Inc. v. Atlantic Richfield Co.*, 712 F.2d 1402, (TECA 1983) *cert. den.*, —— U.S. ——, 104 S.Ct. 278 (1983) claims that assessment of any prejudgment interest in this case is error.[37] In *Eastern Air Lines*, a private action for damages under Section 210 of the ESA, the trial court denied a claim for prejudgment interest when the amount of damages claimed to be due was uncertain. Affirming this ruling, we found that "(a)t all times during this litigation it was evident that the amount claimed by Eastern was the subject of great uncertainty, and it would be inequitable and unjust to make such an award in this case." 712 F.2d at 1410.[38]

More recently we found it to be error to award prejudgment interest in a private action under Section 210, when the ultimate amount of overcharges was "subject to great uncertainty." *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 806, *supra*, (TECA 1984) *cert. den.*, 105 S.Ct. 173. See also, *Zahir v. Shell Oil Co.*, 718 F.2d 1567, (TECA 1983), another private action involving disputes between a gas supplier, franchisee and dealer in possession of gas

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[37] *Eastern Air Lines* was decided by us in June, 1983, after judgment was entered in this action.

[38] Considerable difficulty was had in establishing base prices, and in determining the meaning of certain prices listed on computer printouts. See f.n. 11, p. 1407, 712 F.2d.

station franchise, where the damage claim was "not for a liquidated or readily liquidatable sum." We there found that the trial court *did not abuse its discretion* in declining to award prejudgment interest. 718 F.2d at 1573.

Eastern Air Lines, etc. are clearly distinguishable in that they involved private actions for damages, and not claims for restitution brought by the Government under Section 209 of the ESA. Indeed, in *Eastern Air Lines* we relied upon *Belcher v. Birmingham Trust National Bank*, 488 F.2d 474, 478 (5 Cir. 1973) which applied state law, for our conclusion that "prejudgment interest is not available where the amount of damages claimed to be due is uncertain." 712 F.2d at 1410. *Belcher* involved a claim by an appraisal company for services rendered in valuing a corporation's assets. In granting a fee, the trial court included prejudgment interest as part of the award. The Fifth Circuit determined that interest was improperly included because of the applicable state rule in Alabama that interest is not allowed on unliquidated demands.

We need not concern ourselves with any discussion of varying circumstances which may surround the award of damages under state law or under Section 210 of the Act. In *Sauder*, the Remedial Order at issue ordered Sauder to refund "overcharges in the total amount of $342,589.00 plus interest accrued on unrefunded overcharges" at certain specified rates. In overruling Sauder's complaint that he should not be liable for interest, the trial court ruled that such payment was appropriate: [39]

> "Section 209 of the ESA . . . gives the Court power to grant an injunction against Sauder. The statute goes on:

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[39] *Sauder v. DOE*, 4 Energy Mgmt. (CCH) Para. 26,157, at p. 27,397 (D.C. Kan. 1979).

> 'In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.'
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> "The statute does not provide for the payment of interest on the moneys received. On the other hand, . . . courts have imposed interest in situations involving agency orders without express statutory permission.
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> * * *
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> "The same reasoning applies here. Sauder has had the use of the money which was overcharged to Mobil, and Mobil has been deprived of that use. Therefore, to make Mobil whole, interest on the $342,589 was properly ordered by FEA. The Court will order Sauder to make refunds to Mobil plus interest, in the percentages ordered by the agency."

In affirming the trial court in *Sauder*, we did not separately discuss the issue of prejudgment interest, but our approval of the interest award is inherent in our ruling there regarding the equitable powers of the court and agency "to set things right":

> "Equitable pricing is one of the important objectives of the Emergency Petroleum Allocations Act, 'and this objective cannot be bogged down in an administrative quagmire.' . . . Congress has explicitly given the courts 'equitable power . . . to set things right and order restitution,' in instances of overcharging . . . The district court's order enforcing the agency's decision is fully consistent with this grant of authority." 648 F.2d at 1348. (citations omitted).

In discussing the scope of Section 209 of the ESA, we further observed that:

> ". . . even if the statute is construed strictly, it appears that the agency's action is within its grant of authority. 'In equity, restitution is usually thought of as a remedy by which defendant is made

to disgorge illgotten gains *or to restore the status quo*, or to accomplish both objectives.'

* * *

"Here the agency seeks only 'to restore the status quo' and 'to set things right.' It does not seek to recover Mobil's *damages*, which may or may not be the amount of the overcharges, but asks Sauder to make restitution of the precise amount of the overcharges paid to all property owners plus interest.

Nor do we believe that Congress intended to limit the agency's and courts' power to restore overcharges. The legislative history indicates that the explicit reference to restitution in Section 209 was to settle any doubt that 'there was an inherent equitable power in the court to set things right and order restitution. . . .' There is no indication, however, that the section thereby attempts to limit the power of the courts or the agency to restitution or to a particularly strict interpretation of restitution. 'Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity the full scope of that jurisdiction is to be recognized and applied. . . .' (648 F.2d at 1348).

(Emphasis of the court; citations omitted).

Exxon further suggests that it was improper to award interest of any kind in this instance, inasmuch as the judgment here should be considered in the nature of a *penalty*, upon which interest may not be allowed. This argument is based upon Exxon's specious argument that since the trial court did not trace injury to specific victims, there were no "victims" and hence there could be no order of restitution. From this, Exxon claims that an award to state governments, which were not themselves "victims" of overcharges, was in fact an imposition of a penalty and not an award of restitution.

As previously noted, the trial court determined that civil penalties would not be imposed upon Exxon. The Government has not pursued that remedy on appeal. As

will be noted in our discussion, *infra*, the court found the ultimate victims of Exxon overcharges to be the consumers of this nation, and its order distributing the recovery of overcharges employs the state governments merely as conduits for such distribution.

We conclude that the award of prejudgment interest under the circumstances of this case was clearly within the discretion of the trial court. We further conclude that the award of such interest, at the rates selected by the trial court in Appendix II to its opinion, 561 F.Supp. at 864, was not an abuse of such discretion, and there was no error.[40]

D. *Equitable Considerations.*

Exxon has presented, as a separate issue, its contention that that trial court, as a court of equity, erred in requiring restitution of the full amount of the overcharges with interest. In particular, Exxon complains that the court could not determine what was "equitable" without conducting an evidentiary hearing and thereafter "balancing the equities" under the facts presented at such hearing.

The essence of this claim is Exxon's contention that the trial court ignored its own conclusions that the Exxon

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[40] Exxon contends that for the period from January 1, 1975 through August 26, 1982, interest should be computed as simple interest in accordance with rates established by the IRS in assessing delinquent tax accounts at the following rates:

Period	Rate
January 1, 1975 through June 30, 1975	6%
July 1, 1975 through January 31, 1976	9%
February 1, 1976 through January 31, 1978	7%
February 1, 1978 through January 31, 1980	6%
February 1, 1980 through January 31, 1982	12%
February 1, 1982 through August 27, 1982	20%

On the prejudgment interest issue, we adopt the able reasoning of the trial court set out at pp. 857-858, 561 F.Supp.

unitization program was "undertaken for bona fide business reasons" which had begun "long before any regulations on crude oil prices existed," and that Exxon "accurately represented its conduct to the agency," and at times received from the agency informal and puzzling replies to Exxon's inquiries. Exxon further points to alleged "confusion" in interpretation of the regulations, its right to certain amounts of "new oil" which it lost because of unitization under the court's interpretation of the regulations, and its reiterated complaint that it was inequitable to refuse to extend the benefits of Section 212.75, when the "burdens" of that section were applied retroactively.

The trial court's findings regarding the retroactive impact of Section 212.75 have been fully discussed and determined, *supra*.

Exxon's arguments concerning the bona fides of its business conduct were resolved in its favor by the trial court in determining that the imposition of civil penalties in this case would be inappropriate, and such findings were before the court in making its order of restitution. In arriving at its decision on penalties, the court pointed out that this did not excuse Exxon's behavior:

> "Exxon pushed the agency at every turn and probed each nuance in the regulations to interpret them to Exxon's advantage, sometimes ignoring their unequivocal dictates." 561 F.Supp. at 858.

Exxon's reference to "confusing regulations" and agency indecision, is simply a recasting of its unsuccessful claim in the trial court that the Government was estopped from challenging the legality of lease-by-lease accounting. The argument made here on "equitable grounds" is no more persuasive, and we adopt the findings of the trial court on that issue, as set out at 561 F.Supp. at 845-848.[41]

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[41] The estoppel claim, to which the trial court devoted so much attention, was not raised as a separate issue on this

Finally, Exxon again raises the issue of prejudgment interest by asserting that it is inappropriate "where a party's actions were not 'willful'," and were not intentionally wrong. For the reasons heretofore discussed, such argument is without merit.

X. THE REMEDY

Having determined the nature and extent of Exxon's liability, the district court was required to fashion an appropriate remedy in restitution commensurate with the extent of that liability. In so doing, the court first determined that, because of the nature of the Entitlements Program, and the price control regulations, the effect of Exxon's wrong had been spread throughout the distribution chain, to the ultimate consumers, so that it was impossible to trace the overcharges to specific victims, or to calculate precise damages sustained by such persons. Under these circumstances, the district court concluded that the overcharges should be distributed to those victims by channeling the funds received in restitution through the states, for the purpose of funding energy programs designed to benefit all citizens. In so doing, the Court used as guidance certain principles adopted by Congress in the Warner Amendment, Section 155, Pub. L. No. 97-377, 96 Stat. 1830 (1982), directing the disbursement of unclaimed petroleum violation escrow funds:

> ". . . Section 155 clearly bespeaks the intent of Congress that violators of the petroleum price regulations should be made to disgorge their illgotten gains

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appeal. The Government pointed out that this defense "has been dropped." U.S. Brief, p. 4, f.n. 1.

In its inimical style, Exxon has responded that ". . . (c)ontrary to the DOE's assertion, Exxon has neither 'dropped' its estoppel defense nor failed to press its statute of limitations defense . . . . As Exxon previously explained, in the event of a reversal and remand because of the improper resolution of factual issues, Exxon intends to assert the legal arguments to which such contested facts relate."

> even in situations, like the case before the court, where the victims of the petroleum overcharges cannot be identified. The colossal scale of Exxon's wrongdoing, and the workings of pervasive regulations to spread the burden of that wrongdoing impossibly far and wide, must not deter this court from fashioning an appropriate equitable remedy. The purpose of the domestic petroleum price regulations was to keep oil prices down, to relieve consumers of some of the burden of towering oil costs. The five energy conservation programs identified in Section 155 operate across the nation to reduce that same burden, either by reducing overall consumption through conservation or by direct financial assistance to those most in need. Although one might speculate as to alternative remedies, this court respects the wisdom of the solution chosen by Congress and shall adopt it as the most appropriate equitable remedy in the circumstances of this case." (561 F.Supp. at 857)[42]

In this appeal, Exxon contends that the award to uninjured state governments is not "restitution," that such award improperly exposes Exxon to multiple liability, and that the district court assessed liability upon erroneous assumptions concerning the workings of the Entitlements Program, and Exxon's "unproved refiner allocation violations," without granting Exxon any discovery or opportunity to defend charges of refiner violations. The point to these challenges of the remedy adopted by the trial court appears to be that Exxon considers that it should retain or have a share in the overcharge funds because it was a "first purchaser" of production from the field, or because it, as a refiner, was a participant in the En-

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[42] The five energy programs to benefit from restitution funds paid over to the states include weatherization of buildings, implementation of state energy conservation programs, reduction of energy consumption in schools and hospitals, promotion of conservation by small businesses and individuals, and assisting the poor with home utility bills. See opinion of the District Court, 561 F. Supp. at 856, f.n. 58.

titlements Program, or because it would be appropriate to leave the overcharges in Exxon's hands because it is impossible to identify the ultimate victims.

A. *Primary Jurisdiction.*

Some suggestion has been made that since the Department of Energy has significant expertise in assessing the implications and impact of its various regulations upon the petroleum industry, the question of ascertaining the victims of the overcharges in this case should be first referred to the agency for determination under the doctrine of primary jurisdiction. *United States v. Western P. R. Co.*, 352 U.S. 59, 1 L.Ed.2d 126 (1956), and see *In re Dept. of Energy Stripper Well Exemption Lit.*, 578 F.Supp. 586, 595-596 (D. Kan. 1983).[43]

It should be remembered that this appeal involves an action for restitution, brought by the agency under the provisions of Section 209 of the Act—it does not involve proceedings to enforce a Remedial Order issued by the agency through administrative proceedings. When an agency chooses to file suit and is the plaintiff before the Court, the doctrine of primary jurisdiction does not apply. It has been pointed out that "deference to an agency's primary jurisdiction makes little sense in the context of an enforcement proceeding initiated by the agency." *United States v. Alcon Laboratories*, 636 F.2d 876, 888 (1 Cir. 1981), *cert. den.* 451 U.S. 1017.

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[43] The agency has set up special procedures for distribution of refunds recovered through Remedial Orders and Consent Orders processed through its administrative procedures. These procedures, sometimes referred to as "Subpart V proceedings," are instituted by petition in the Office of Hearings and Appeals. The OHA may decline to consider applications for refunds that are "too small to warrant individual consideration," in view of "direct administrative costs" that may be involved. 10 C.F.R. Sections 205.280 et seq.

In the *Stripper Well Litigation*, which was referred to the OHA in September, 1983, no final report has been made by the agency.

The litigation began as an administrative proceeding, "and might have continued in that forum had the defendant not filed an action for declaratory relief" in Texas. *United States v. Exxon Corp., supra,* 470 F.Supp. 674. Instead, the DOE withdrew its Notice of Probable Violation and began this action under Section 209. We previously ruled that the Department had dual enforcement authority, and that it need not exhaust its administrative authority before proceeding directly in court to enforce its remedy for restitution. *Exxon Corp. v. United States, supra,* 616 F.2d 526.

While a referral to the OHA might be appropriately ordered by a trial court in the exercise of its discretion under some circumstances,[44] we do not find that the Exxon litigation should be referred as a matter of law under any doctrine of primary jurisdiction. In our view, administrative proceedings would be "unnecessary, unnecessarily expensive, and likely to have a pre-ordained outcome," fostering further needless delay. *United States v. Elrod,* 627 F.2d 813, 818 (7 Cir. 1980).

B. *Intervenors*

The appellant intervenors, described above, have presented competing claims as to why each should receive a share of the refunds because of the manner in which each bore the burden of the overcharges.

The refiner intervenors claim that any burden was automatically shifted from first purchaser-refiners to all of the over 200 participants in the Entitlements Program by

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[44] We understand that in the *Stripper-Well* Multi-District litigation a number of cases involved Remedial Orders requiring modification or further administrative adjustment. The DOE there took the position that it would be appropriate to have all of the cases remanded for the purpose of tracing overcharges. The District Court retained jurisdiction, specifically noting that it, and *not* the DOE would decide where the funds go. 578 F. Supp. at 596.

10 C.F.R. Section 211.67. They claim the overcharges should be distributed among all refiners. The jobbers and independent gasoline dealers claim that the refiners passed through overcharges to them, and they are entitled to share in the refund. Certain groups of consumers, such as the airline industry, utilities, freight lines and motor vehicle owners claim that they bore the burden of the overcharges, and they suggest a remedy whereby such groups can be individually compensated by shares in the refund.

These intervenors complain that they were not allowed to appear as parties to present evidence on their various claims for refund, and so they were wrongfully denied their "day in court". Only two groups, the Indicated Refiners and the Gasoline Retailers sought to intervene prior to the decision of the trial court.[45]

After judgment was entered in the trial court, we filed our opinion in *Cities Service Co. v. Department of Energy, supra*, 715 F.2d 572, determining that Cities Service had no right to intervene in a DOE enforcement action against Pennzoil for violation of price controls on crude oil. At issue was a DOE counterclaim against Pennzoil, filed under Section 209 of the ESA, which was settled by Pennzoil's agreement to pay $14,750,000 to the United States Treasury. In so doing, we discussed the significant difference between Section 209 and Cities' private right of action under Section 210 of the Act:

> "While sections 209 and 210 have a common purpose—the enforcement of DOE's regulations—they vindicate different rights. 'Actions by the United States under ESA Section 209 are taken to enforce

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[45] In December, 1982 and February, 1983 at the request of DOE and Exxon, the trial court stayed the requests to intervene pending resolution of the liability issue. Following entry of the Memorandum decision, intervention was granted solely for the purpose of arguing on appeal the question of distribution of the refund.

> public, not private, rights.' *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 722 . . . . By contrast, the action authorized by section 210 'is intended to be brought by private persons against other private persons.' . . . . We have previously warned against '(t)he commingling of private and agency enforcement devices for which Congress has made separate provisions . . . .' *Dyke v. Gulf Oil Corp.*, 601 F.2d 557, 567 . . . The outcome of the instant case, an agency enforcement action brought by DOE, will in no way affect Cities' private right to sue Pennzoil directly for damages. . . Under these circumstances, the district court correctly concluded that Cities has no interest that would be impaired by disposition of this action." (715 F.2d at 573-574)

Exxon attempts to distinguish *Cities Service* upon the ground that the overcharging firm (Pennzoil) had "voluntarily" entered into a consent order with the DOE, thereby taking the risk that it might also have to pay damages to third parties under Section 210 of the Act.

Exxon's claim of possible exposure to "double liability" is without persuasion. Any private action under Section 210 would be governed by state statutes of limitations. See *Gulf Oil Corp. v. Dyke, supra*, 734 F.2d 797, 808, and *City of Long Beach v. D.O.E., supra*, —— F.2d ——. Exxon claimed that the two year statute of limitations for the State of Texas would apply to any private action under Section 210.

In any event, any Section 210 liability award against Exxon can be adjusted, if necessary, to take into account the restitution award here. See *Bulzan v. Atlantic Richfield Co.*, 620 F.2d 278, 283-284 (TECA 1980), and see *Dyke v. Gulf Oil Corp., supra*, 601 F.2d at 566 (1979).[46]

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[46] Consumers Power and Hudson Refining Company voluntarily dismissed their appeals as Intervenor appellants in this case, and filed a class action suit in the District of Indiana under Section 210(a) of the ESA on behalf of all domestic refiners of crude oil that participated in the "Old Oil Entitlements Program," excluding sixteen large refiners that pro-

We adhere to our prior rulings in *Dyke* and *Cities Service* to the effect that public and private rights of action are separate and distinct, and not to be mingled in one proceeding. To do otherwise would hopelessly disrupt orderly proceedings in this type of action, and, as pointed out in *Dyke*, "the timing and scope of enforcement would become subject to the vagaries of private litigation. . . . Any wholesale commingling of discrete administrative and judicial responsibilities in public and private actions likely would hinder, disrupt, and render torpid the statutory scheme for expedited enforcement." 601 F.2d at 567.

Consumer Intervenors, presently without standing to institute private actions against Exxon under Section 210, agree that the overcharges were "passed down" to end consumers. They urge that a separate escrow fund be set up for their benefit before distribution to the states, or, alternatively, they suggest that the ascertainment of the victims of the overcharges be referred to the OHA, as discussed previously.[47] While such pro-

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duced in excess of 100,000 barrels per day of crude oil, etc., *Consumers Power Company, et al. v. Exxon Corporation*, No. H83-0610, N.D. Indiana, filed 10/3/83. It is claimed that Exxon overcharges were borne by plaintiffs to the injury of a class numbering 300, in an amount exceeding $240 million.

[47] RJB Cab, Inc., and Geraldine Sweeney, Intervenor-Appellants here, representing consumer interests, have filed a class action in the Eastern District of Pennsylvania, for declaratory judgment finding distributions under the "Warner Amendment" unconstitutional, and without effect. This action concerns administrative Consent Orders and settlement agreements entered into by the DOE in lieu of judicial actions brought under Section 209 of the ESA where settlement proceeds were paid into an escrow fund, then distributed in part to the states under the Warner Amendment. *RJG Cab, Inc., et al. v. Donald Hodel, et al.*, No. 83-3265, Eastern District of Pennsylvania, 1983.

The Pennsylvania action does not, of course, involve a judicial exercise of discretion by a court ordering restitution under Section 209.

cedure would be one method of distributing the overcharges, it is not the only method. For the reasons hereinafter discussed, we determine that the course chosen by the trial court was appropriate under all of the circumstances here.[48]

C. *The Consumer as Ultimate Victim.*

In its attack upon the remedy devised below, Exxon (and some Intervenor appellants) take the position that the trial court was required to trace, or attempt to trace, the overcharges from first purchaser, to refiner, through various monthly accountings required by the Entitlements Program, and its "banking" system, and then to determine the nature and extent of any passthrough of increased costs through the distribution system, such as might be authorized by 10 CFR Sections 212.83(c)-(d) (refiners) and 212.93 (a) (resellers and retailers). It is appellants' position that such inquiry is required by our decision in *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (TECA 1982), *cert. den.*, 459 U.S. 877 (1982).

In *Citronelle*, the Government sought restitution under the provisions of Section 209 for overcharges involved in four sales of domestic crude oil which had been improperly treated as export oil, exempt from price regulation. The District Court, finding that it could not "envision a formula which could make a meaningful distribution to the millions of consumers from Florida to Massachusetts who purchased power or goods . . .", ordered that restitution should be made to the United States Treasury. *Citronelle-Mobile Gathering, Inc. v. O'Leary*, 499 F.Supp. 871 at 886, (S.D. Ala. 1980).

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[48] The Court appreciates the efforts of counsel for all Intervenor appellants, as well as that of counsel for the Intervenor appellee states. All briefs and arguments were most helpful to the court in reaching its decision.

On appeal we fully recognized the broad equitable powers of the District Court in fashioning equitable remedies, but found that the order requiring payment of the overcharges to the United States Treasury was improper because it was not in accordance with the Section 209 objective of making victims whole, insofar as possible. The case was remanded for the purpose of fashioning some plan for disbursement of restitution funds, in accordance with the requirement that the Government must at least try to ascertain those persons who had been overcharged. *Citronelle*, 669 F.2d at 723.[49]

In our view, the District Court's judgment and order in this action are fully in accord with our ruling in *Citronelle*, where we specifically noted that:

> "The District Court, sitting as a Court of Equity, unless otherwise provided by statutes here in contemplation, had 'all the inherent equitable powers of the District Court . . . available for the proper and complete exercise of that jurisdiction'; . . . and has the power, 'to do equity and mould each decree to the necessities of the particular case'; further, 'It may act so as to adjust and reconcile competing claims . . . so as to accord full justice to all the real parties in interest . . . .' The authority inherent in the equity powers guarantees complete rather than truncated justice." 669 F.2d at 722. (Citations omitted.)

Here, the District Court appropriately determined that any attempt to trace the overcharges would be doomed to failure because of the pervasive influence of the Entitlements Program and other regulations which had the effect of passing on and diffusing the HFU overcharges through the distribution system. As pointed out by the trial court, this was a factor not present in the

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[49] To date, no plan has been devised by the District Court in *Citronelle*.

Citronelle litigation.[50] We have previously reviewed the consequences of the Entitlements Program. In *Union Oil Co. of Cal. v. U. S. Dept. of Energy*, 688 F.2d 797, 802 (TECA 1982), *cert. den.*, 459 U.S. 1202 (1983), we noted that:

> "Certifications of price-controlled crude oil as exempt crude oil . . . reduced the total amount of crude oil production subject to price controls each month and therefore increased the total cost of the available crude oil supply. As a result, the benefits of price-controlled crude oil which were distributed among all refiners by the Entitlements Program were reduced. Thus, to the extent that crude oil producers sold otherwise price-controlled crude oil as uncontrolled crude oil . . . the higher cost of such uncontrolled crude oil was distributed among all domestic refiners through the operation of the Entitlements Program.

Once the overcharges were disbursed throughout the refining industry, the regulatory system was designed to insure that money spent or received by the refiners as the result of their purchases or sales of entitlements would be passed along to the ultimate consumers. Thus, all refiners were permitted to pass through increased costs to their customers. 10 C.F.R. Section 212.83. 561 F.Supp. at 853. The EPAA specifically provided for "a dollar-for-dollar passthrough of net increases in the cost of crude oil . . . at all levels of distribution from the producer through the retail level." 15 U.S.C. Section 753 (b) (2) (A). The refiners were also permitted to "bank" costs which were not passed through in the sales of products for one month, and to include these banked costs in calculating prices for later months. Calculation of these "banked costs" was subject to variable and complex formulas. 10 C.F.R. Section 212.83(e).

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[50] There were only four shipments of oil in *Citronelle*. All occurred prior to implementation of the Entitlements Program.

Additional regulations permitted the resellers and retailers, in turn, to pass on their increased costs to the ultimate consumer. 10 C.F.R. Sections 212.91 et seq.

This Court long ago recognized that the Entitlements Program was intended to "spread the benefit of access to old price-controlled oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, all regions of the country, *and among all consumers of petroleum products. . . . "Cities Service Co. v. F.E.A.*, 529 F.2d 1016, 1021 (TECA 1975), *cert. denied*, 426 U.S. 947 (1976). (Emphasis supplied).

We agree with the trial court's conclusion that any attempt to trace increased costs attributable to the HFU overcharges would require a full scale audit of the entire petroleum industry, and that any effort to do so would be futile. As the Government suggests, the first step in any such audit would require recalculating over seventy monthly entitlement lists issued during the period of the overcharges, taking into account such variables as the volumes of new and old oil produced during each month, the average acquisition costs, and the values of each entitlement. In determining the precise impact of the overcharges on any particular refiner, it would then be necessary to consider the impact of exception relief which may have been granted by the agency over the term of the Entitlements Program. The difficulty of any such accounting is particularly clear in view of the fact that the DOE has not yet completed or issued a final January 1981 "Entitlements List," designed to settle accounts between the refiners following expiration of price controls. 10 C.F.R. Section 211.69 (1983). See *Navajo Refining Company v. United States Department of Energy*, No. 83-1492-M, D.C. New Mexico, Memorandum and Order of March 30, 1984.[51] See

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[51] In *Navajo Refining*, more than three years after Navajo had paid $4 million into the program, Navajo had not received any restitution to which the DOE had determined it

also, *Consumers Power Company v. Department of Energy*, 742 F.2d 1468 (TECA 1984), where we recently determined a right to participate in the Entitlements Program.

Even if the HFU overcharges could be traced to individual refiners, it would then be necessary to trace their effect on product resellers, retailers and consumers, through the provisions of passthrough regulations. That this task would be futile is illustrated by the difficulty of applying only one aspect of the regulations, that is, the calculation of "banked costs." Exxon itself admitted that it was unable to supply information on its own costs because:

> ". . . adjustments to the cost bank figures cannot be made until all outstanding questions concerning the proper interpretation of the Mandatory Petroleum Price regulations have been resolved. As a result, a final determination of the actual cost bank figures can only be made after all pending administrative and court proceedings have been concluded.
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> * * *
>
> Because this question involves the basic fabric of the entire passthrough program and could involve millions of documents in possession of Exxon, the DOE and other companies, it cannot be answered with specificity." (Answer to Plaintiff's Interrog. 11(b), 19(e), R. 1592, 1602).

The fact that banked costs might exist as to any particular refiner does not mean of course that increased

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was entitled. The FERC had denied reimbursement, "stating only that it was 'sure' DOE would implement relief to Navajo consistent with its responsibilities to wind up the Entitlements Program." p. 6, Slip Op.

After publication of the list, the DOE contemplates a series of "Post-clean-up claims and obligations" procedures whereby the OHA, the FERC, or a court may determine final claims payable under the Entitlements Program. 10 C.F.R. Section 211.69(h).

costs were not passed on through the distribution system. To determine this would require an investigation into the state of mind of each refiner in setting prices for individual petroleum products each month. Such a task would be impossible, and several of the intervenors have so conceded. See Gladieux Brief, p. 9, "No such finding could possibly be made without an extremely time-consuming factual inquiry, one which is almost certainly beyond the capacity of any court or administrative agency;" Marathon Brief, p. 17, "(P)roving passthrough of overcharges would depend entirely on uncertain economic assumptions and impossibly complex measurements."

The refiners' suggestion that refunds be made payable to themselves as "first purchasers" would result in inequities, inconsistent with the fundamental purpose of restitution under Section 209. As the trial court pointed out, prior to decontrol, if a court ordered restitution to a first purchaser, then that refund would eventually be passed along the distribution line to an ultimate consumer of petroleum products. However, in view of the 1981 decontrol of oil prices, "there has existed no ready method of ensuring that overcharges will be refunded to their ultimate victims, the consumer." Under the situation here, the Court found that "(t)o order a refund to the first purchaser would simply result in a windfall gain for that purchaser—ironically, in this case, Exxon itself—who would be under no obligation to pass the refund along." 561 F. Supp. at 854.[52]

There was no need for the District Court in this action to attempt the impossible task of attempting to ascertain

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[52] In *DOE, et al. v. Ray L. Hunt, et al.*, No. 5-101, 5-102, an appeal pending before this court, a Remedial Order of 1977 required a refund to be made to the first purchaser. Due to decontrol and "changed circumstances," the DOE sought a partial remand of the Remedial Order in order to determine whether this refund provision should be modified. The DOE appeals an order requiring payment to the first purchaser.

the damage sustained by individual consumers of petroleum products. In this respect, it should be noted that this action for restitution under Section 209 differs in significant degree from a private action of damages under Section 210. As noted in *Citronelle-Mobile, supra,* 669 F.2d 717 at 722:

> "The central purpose of restitution is to determine the amount by which the wrongdoer has been unjustly enriched and then to make him disgorge that amount. *No proof is required that the plaintiff was damaged, much less the amount of any damage.*" (Emphasis supplied).

The form of relief chosen by the trial court in this action by which the restitution funds will be channeled through the states for use in the enumerated energy programs designed to benefit the consuming public bears a reasonable relationship to the injury sustained by the consumer public as a consequence of Exxon's violation of federal energy pricing regulations. The judgment in this action requires Exxon to pay the overcharges and interest into an interest bearing Treasury escrow account, to be held in trust by the Treasury. Following the conclusion of all appeals in this case, the Fiscal Assistant Secretary of the Treasury is required to disburse the money, with additional accrued interest to the states, with instructions as to use of the funds which are consistent with the trial court's Memorandum. The judgment further orders that the states and other jurisdictions "shall use all funds so disbursed in a manner consistent with" the trial court's order. The states will be required to report annually to the Court and to the DOE the manner in which the funds have been used, until all have been expended.

We believe this form of disbursement to be equitable, and fair, and a reasonable method of compensating the consuming public for the HFU overcharges. It accomplishes the intent of Congress that violators of the price

regulations be required to disgorge their gains, even in situations where it may not be possible to identify and compensate each individual victim. While other remedies might have been adopted by the trial court,[53] the remedy chosen avoids further administrative delay and confusion, with additional costs, it prevents the frustration of congressional objectives in securing prompt enforcement of what has been denominated as "emergency" price regulations, and it is a reasonable means to protect the public interest.

The District Court unquestionably possessed broad equitable powers to remedy the wrong caused through Exxon's violation of price regulations at the Hawkins Field Unit. Under all of the circumstances presented in the record, we conclude that the trial court did not abuse that discretion in fashioning its remedy.

The Judgment of the District Court is AFFIRMED in all respects.

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[53] In *United States v. Robert B. Sutton, et al.*, No. 82-C-1069-B, (N.D. Okla.) involving a claim for restitution under Section 209 of the ESA, the District Court directed payment be made to the states for use in certain energy programs described in the Warner Amendment. *Sutton* is now pending on appeal in this Court.

WILLIAM H. BECKER, Judge, Concurring in Part, and Dissenting in Part.

CONCURRENCE IN PART

First, I wish to concur in the affirmance of the excellent opinion and judgment of the able District Judge on those difficult and complex issues, finding and concluding that Exxon Corporation was liable for overcharges and interest for violation of the applicable statutes and regulations fixing the maximum prices for the crude oil in question. On these issues, which include nearly all the major issues presented in these appeals, the District Judge found the facts and applied the applicable law in an unusually clear, discriminating and exemplary manner. See *United States v. Exxon Corporation* (D.D.C. 1983), 561 F. Supp. 816, for the findings of fact and conclusions of law of the District Court incorporated in the judgment from which these appeals are taken. (Some supplementary undisputed facts in the Record in the District Court are cited in the dissenting opinion which follows.)

DISSENT IN PART

Scope of Dissent

The portion of the majority opinion in this Court, from which I dissent, is included in the part entitled "X. The Remedy." The majority opinion in this part concludes that the District Court exercised a *legal discretion* in ordering the funds representing illegal overcharges in the principal sum of $1,635,604,638.10 and interest to be paid by the Exxon Corporation to the United States Treasury to be held in trust for disbursement to the States for use in one or more of five energy conservation programs listed in the "Warner Amendment," § 155 of P.L. 97-377, 96 Stat. 1830, 1919 (1982). Whether this disposition might have been within the

discretion of the District Court, if the District Court in an efficient judicial manner had satisfied all legally established claims in restitution of victims of the overcharges is not a subject of this dissent. It may be that on a fuller record payments on doctrines of fluid recovery, *cy pres* or *parens patriae* or other applicable doctrines should be made to groups representing all the public or other identifiable groups of victims.

This disposition of the overcharges and interest was finally adjudged by the District Court, without any judicial or administrative attempt by notice and hearing, to identify the victims of the illegal overcharges or the amounts of the damages suffered by each victim or groups of victims. In fact, many parties claiming in good faith to be victims of the illegal overcharges were denied notice and an opportunity to be heard on their claims, or to intervene for these purposes.

In my opinion, this summary denial of a hearing on the claims in good faith of the alleged victims, violated established historical equitable principles of restitution and of procedural Due Process guaranteed by the Fifth Amendment to the Constitution of the United States.

The historical equitable and constitutional principles, in my opinion, cannot be lawfully ignored in the discretion of a court, as explained hereinafter.

I

JUDICIAL DUTY AND POWER TO ORDER RESTITUTION

Under the controlling decisions of the Supreme Court of the United States, this Court and the Circuit Courts of Appeals, this dissenting opinion concludes, among other things, that the federal courts have the inherent historic equitable and constitutional duty and power to order restitution to parties damaged by violations of valid statutes or regulations, or both, fixing prices, al-

locations and incidental rights and duties (as in the Entitlements Program).[1]

Therefore the inherent judicial duty and power to order such restitution exist (a) in civil actions, under § 209 of the Economic Stabilization Act, to enforce such valid statutes or regulations, or both, and (b) also in equitable civil actions in which the violations were temporarily protected by injunctions, wrongfully issued. This judicial duty and power is authorized by general law and was expressly confirmed by Congress in the last sentence of § 209 of the Economic Stabilization Act (ESA). 12 U.S.C. 1904 note; 1971 U.S. Code, Congressional and Administrative News (USCCAN) 2291 reporting the legislative history of the ESA.[2] As stated by the Supreme Court of the United States in *Porter v. Warner Holding Company*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946), the judicial duty and power to order such restitution are broader and more flexible when the statutes or regulations in issue, or both, primarily serve the public, rather than a private interest,

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[1] Such inherent judicial duty and power to order restitution in civil actions exists whether the violations were, or were not, temporarily protected by an improperly issued injunction, later vacated by the issuing court or by an appellate court.

[2] The fact of recognition and endorsement rather than creation, by Congress, of the power and duty to order restitution in § 209 is established by the relevant portion of the legislative history of § 209 reported in 1971 USCCAN at page 2291 where it is stated:

> "In addition to injunctive relief, the court may also order restitution of moneys received in violation of any regulation or order. It was not certain that, in these circumstances, there was an inherent equitable power in the court to set things right and order restitution. Restitution has been granted in several cases successfully prosecuted by the Government in Phase I (*United States v. Lieb*, Civil Action No. SA 71 CA 267, D. C., W.D. Tex., Oct. 13, 1971). This provision makes clear that the court has power to grant restitution."

as in the EPAA, the EPCA and regulations thereunder, which primarily serve the public interest.

Selected controlling decisions of the Supreme Court of the United States defining and enforcing the judicial duty and power to order such restitution are cited and summarized hereinafter.

A.

Selected Controlling Decisions of Supreme Court of the United States on Duty and Power to Order Restitution

In *Porter v. Warner Holding Company (Warner Holding), supra,* 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946), the duty and power of a federal court under the Emergency Price Control Act of 1942 (Act), 50 U.S.C. § 925(a), to order restitution of rents collected in excess of legally permissible ceiling rates were defined and enforced by the Supreme Court. In that case, the District Court had enjoined the defendant landlord from collecting excess rents, but declined to order restitution, holding there was no jurisdiction to do so under the Act. The Eighth Circuit Court of Appeals affirmed the judgment of the District Court.

The Supreme Court reversed the judgment of the District Court finding that the Administrator of the Office of Price Administration had invoked the equitable jurisdiction of the District Court by seeking an injunction to enforce the rent ceiling. The Supreme Court then held that the District Court had the broad inherent equitable duty and power to do what justice required, stating:

> "Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. *And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character*

than when only a private controversy is at stake. Virginian R. Co. v. System Federation, R. E. D. 300 US 515, 552, 81 L ed 789, 802, 57 S Ct 592. Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and mould each decree to the necessities of the particular case.' Hecht Co. v. Bowles, 321 US 321, 329, 88 L ed 754, 760 64 S Ct 587. It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice. Camp v Boyd, 229 US 530, 551, 552 57 L ed 1317, 1326, 1327, 33 S Ct 785. (Emphasis added.)

"Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' Brown v Swann, 10 Pet. (US) 497, 503, 9 L ed 508, 511. See also Hecht Co. v. Bowles, supra (321 US 330, 88 L ed 761, 64 S Ct 587)." *Warner Holding*, 328 U.S. at 398, 66 S.Ct. at 1089, 90 L.Ed. at 1336, 1337.

In *Public Service Commission of Missouri v. Brashear Freight Lines (Brashear Freight)*, 312 U.S. 621, 61 S.Ct. 784, 85 L.Ed. 1083 (1941), many common carriers secured in a District Court an invalid injunction against

enforcement of a valid regulatory statute of Missouri imposing taxes and license fees on motor carriers operating in interstate commerce. The Supreme Court held that the District Court had the duty and power to assess damages including costs of litigation, taxes and fees, caused by the improperly granted injunction, under which the challenged taxes and license fees had been deposited in escrow, stating:

> "Under long settled equity practice, courts of chancery have discretionary power to assess damages sustained by parties who have been injured because of an injunctive restraint ultimately determined to have been improperly granted. Russell v. Farley, 105 U.S. 433, 44 et seq., 26 L ed 1060, 1064; Pease v. Rathbun-Jones Engineering Co., 243 US 273, 279, 61 L ed 715, 721, 37 S Ct 283, Ann Cas 1918C 1147." *Brashear Freight*, 312 U.S. at 629, 61 S.Ct. at 788, 85 L.Ed. at 1088.

In *Brashear Freight, supra*, the Eighth Circuit Court of Appeals had failed to recognize and enforce the duty and power of the District Court to make restitution, despite the deposit in escrow or trust of the challenged taxes and license fees under the protection of the improperly issued injunction against enforcement of the regulatory statute of Missouri.

In 1960, the Supreme Court of the United States in *Mitchell v. De Mario Jewelry (De Mario Jewelry)*, 361 U.S. 238, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960), expressly affirmed *Warner Holding, supra*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946). In *De Mario Jewelry, supra*, the Supreme Court quoted the language of *Warner Holding, supra*, stating that a court in equity may give whatever relief is necessary, and then stated:

> "The applicability of this principle is not to be denied, either because the Court there [*Porter v. Warner Holding Co.*] considered a wartime statute, or because having set forth the governing inquiry,

> it went on to find in the language of the statute affirmative confirmation of the power to order reimbursement. Id. 328 US at 399. When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to *have acted cognizant of the historic power of equity to provide complete relief* in light of the statutory purposes." *De Mario Jewelry*, 361 U.S. at 291, 292, 80 S.Ct. at 335, 4 L.Ed.2d at 326 (emphasis added).

In *United States v. Morgan (Morgan II)*, 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211 (1939), the Supreme Court of the United States ruled on the disposition of a fund paid into the court pending the outcome of a suit to set aside an order by the Secretary of Agriculture under the Packers and Stockyards Act of 1921, 7 USCA §§ 181-229. The challenged order reduced scheduled rates at the Kansas City stockyards. The fund was the difference between the old, high rate and the new, low rate ordered by the Secretary of Agriculture. [In 1938, in an earlier case, the new low rate had been set aside by the Supreme Court. *Morgan v. United States (Morgan I)*, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (1938).]

In 1939 in *Morgan II, supra*, the Supreme Court stated that:

> "Decision turns on the meaning and application of the provisions of the Packers and Stockyards Act, construed in the light of its dominant purpose to secure to patrons of the stockyards prescribed stockyard services at just and reasonable rates, and upon the *authority and duty of the district court* to effectuate that purpose in making disposition of the fund." *United States v. Morgan*, 307 U.S. at 188, 189, 59 S. Ct. at 798, 799, 83 L.Ed. at 1216 (emphasis added).

In 1939 in *Morgan II, supra*, the Supreme Court discussed further the authority and duty of the District Court, stating:

"*The district court*, in staying the Secretary's order and at the same time arresting the excess payments to appellees under the scheduled rates, *assumed the duty of making the proper disposition of the fund upon the termination of the litigation.* The duty was the more imperative here because the court's injunction order not only deprived the public of the benefit of the lower rates but obstructed any effective reparation order by the Secretary. Its action presupposed that the ownership of the excess payments was in doubt and could be finally determined only by an adjudication on the merits of the reasonableness of the filed rates. *In taking the payments into custody it acted as a court of equity, charged both with the responsibility of protecting the fund and of disposing of it according to law*, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result. It entered into no contract or understanding with the litigants; it entered into no undertaking as to the manner of disposing of the fund; its duty with respect to it is that prescribed by the applicable principles of law and equity for the protection of the litigants and the public, whose interests the injunction and the final disposition of the fund affect. Inland Steel Co. v. United States, 306 U.S. 153, ante, 557, 59 S.Ct. 415, supra. (Emphasis added.)

"It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved." *United States v. Morgan*, 307 U.S. at 193, 194, 59 S.Ct. at 801, 83 L.Ed. at 1218, 1219.

Later, in *Federal Power Commission v. Interstate Natural Gas Company (Interstate Natural Gas)*, 336 U.S. 577, 69 S.Ct. 775, 93 L.Ed. 895 (1949), the Supreme Court of the United States ordered that the Court make restitution to the consumers rather than the first pur-

chasers of natural gas of a fund accumulated in escrow pending review of a Federal Power Commission (FPC) order reducing rates for natural gas. The pipeline companies that were the direct purchasers claimed the fund, but petitioner and several state and municipal agencies claimed that the fund should be paid to the ultimate consumers. The Court of Appeals ordered payment to the pipeline companies on the authority of *Central States Electric Company v. Muscatine (Central States)*, 324 U.S. 138, 65 S.Ct. 565, 89 L.Ed. 801 (1945). The Supreme Court distinguished *Central States, supra*, on the fact that in the *Interstate Natural Gas* case, under review, the pipeline companies were subject to the jurisdiction of the FPC and federal law; and found that the aim of the Natural Gas Act was "to protect ultimate consumers of natural gas from excessive charges" because "[t]hey were the intended beneficiaries of rate reductions ordered by the federal commission. . . ." *Interstate Natural Gas, supra*, 336 U.S. at 581, 69 S.Ct. at 778, 93 L.Ed. at 901. In that case, the Supreme Court reasoned that reduced rates would have been passed through by the wholesaler "unless we are to assume that the passage of the Natural Gas Act was an exercise in futility." *Interstate Natural Gas*, 93 L.Ed. 895 at 901. In that case the Supreme Court further *held that the lower court must look beyond the first purchaser and seek the proper recipients of the fund* stating:

> "But apart from those exceptions [unreasonably low rates by pipeline companies or pass through of rate reductions], it is the duty of the court to look beyond those companies for the rightful claimants of the fund. It is the responsibility of the court which distributes the fund accumulated under its stay order "to correct that which has been wrongfully done by virtue of its process.' United States v. Morgan, 307 US 183, 197, 83 L ed 1211, 1220, 59 S Ct 795. *That responsibility plainly cannot be discharged by pay-*

ment of the fund to those who show no loss by reason of the court's action. (Emphasis added.)

* * * * * *

"When a federal court of equity grants relief by way of injunction it has a responsibility to protect all the interests whom its injunction may affect. Inland Steel Co. v. United States, 306 US 153, 83 L ed 557, 59 S Ct 415. It assumes the duty to make disposition of the fund in accord with equitable principles. United States v. Morgan, supra, (307 US at 191, 83 L ed 1217, 59 S Ct 795). If in a particular case the court reaches the question of reasonableness of rates, it does so only for purposes of distributing the fund for whose creation it alone was responsible. It does not fix or prescribe rates for the past or the future. The reasonableness of rates charged by the companies who claim the fund is wholly ancillary to the problem of determining what claimants are equitably entitled to share in it.

* * * * * *

"In conclusion, the task of the federal court in distributing the fund accumulated by virtue of its stay order is to undo the wrong which its process caused. The basic problem, therefore, is not to fix rates but to determine who suffered a loss as a result of the court's action in granting the stay. What in fact would have happened as a consequence of federal or state law if the stay had not been issued, no one can know for a certainty. But federal court must make its prognostication, whether an excursion into federal or state law questions is entailed. Distribution of the fund should not involve prolonged litigation. It is an administrative matter involving the exercise of an informed judgment by the federal court and should have the flexibility and dispatch which characterize the administrative process." *Interstate Natural Gas*, 336 U.S. at 582, 584, 69 S.Ct. at 778, 779, 93 L.Ed. at 901-903.

B.

Controlling Cases from this Court on the Judicial Duty and Power to Order Restitution

This Court, the Temporary Emergency Court of Appeals of the United States (TECA), has consistently followed the controlling decisions of the Supreme Court of the United States in ordering restitution in cases in which illegal charges were collected in violation of a statute or regulation, or both. *Citronelle-Mobile Gathering, Inc. v. Edwards,* (TECA 1982), 669 F.2d 717, cert. denied, 459 U.S. 877, 103 S.Ct. 172, 74 L.Ed.2d 141 (1982); *Sauder v. Department of Energy,* (TECA 1981) 648 F.2d 1341; *United States of America v. Pro Football, Inc.,* (TECA 1975) 514 F.2d 1396; *DeRieux v. Five Smiths, Inc.,* (TECA 1974) 499 F.2d 1321, cert. denied, 419 U.S. 896, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974); *University of Southern California v. Cost of Living Council,* (TECA 1972) 472 F.2d 1065, cert. denied, 410 U.S. 928, 93 S.Ct. 1364, 35 L.Ed.2d 590 (1973); *United States v. Lieb,* (TECA 1972) 462 F.2d 1161.[3]

Citronelle-Mobile Gathering, Inc. v. Edwards (Citronelle),[4] *supra,* (TECA 1982) 669 F.2d 717, *cert. denied,* 459 U.S. 877, 103 S.Ct. 172, 74 L.Ed.2d 141 (1982), was our last definitive opinion on the duty and power to order restitution of excess prices collected in violation of statutes and regulations governing the price of petroleum products. In that case, the Secretary of Energy on behalf of the United States asserted an enforcement counterclaim under § 209 of the ESA on behalf of domestic

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[3] In an unappealed final judgment within the scope of the appellate jurisdiction of this Court, a District Court ordered restitution of unlawful excess charges for football tickets in violation of the Economic Stabilization Act (ESA) of 1970. *Oakland Raiders v. Office of Emergency Preparedness,* (N.D. Cal. 1974) 380 F. Supp. 187.

[4] See additional discussion of *Citronelle, supra,* in Part I C., below.

customers alleged to have been overcharged. The District Court granted a partial summary judgment for the United States (Secretary) on the counterclaim under § 209 holding that the appellants (Citronelle-Mobile Gathering, Inc., and others) collected excess prices in violation of the ESA and EPAA and regulations thereunder. This Court then ordered and authorized restitution of the illegal excess charges by deposit in a trust account in accordance with the then existing General Accounting Office Procedures, or under a plan for a "Deposit Fund Account" *or other appropriate procedures to be approved by the District Court* stating in part:

"RESTITUTION IS APPROPRIATE RELIEF

"Having agreed with the district court's determination that appellants have violated the provisions of the ESA, EPAA and the regulations promulgated thereunder which establish the ceiling price for the four sales of domestic crude oil, and the maximum lawful selling price for the resale of domestic crude oil, 6 C.F.R. part 150 and 10 C.F.R. part 212, this Court reviews the relief fashioned by the district court judge. The counterclaim seeks judgment requiring plaintiffs to pay into an escrow account, 'for subsequent distribution to NEPCO customers', the excess charges. Allegations place the sum between $6,000,000.00 and $9,000,000.00, exclusive of interest and civil penalties. No accurate calculations are before the Court at this time.

* * * * * *

"An immediate confrontation with the method/process of enforcement emerges. Neither appellants, nor various *amici* attack restitution as being outside the scope of relief authorized, rather, they insist the decision ordering restitution to the United States Treasury is beyond the district court's authority. The Court finds on this issue no justification for allowing plaintiffs to retain their illegal gains.

"The district court, sitting as a Court of Equity, unless otherwise provided by statutes here in contemplation, had 'all the inherent equitable powers of the District Court . . . available for the proper and complete exercise of that jurisdiction'; *Porter, supra* 328 U.S. at 398, 66 S.Ct. at 1089, and has power, 'to do equity and mould each decree to the necessities of the particular case'; further, 'It may act so as to adjust and reconcile competing claims . . . so as to accord full justice to all the real parties in interest. . . .' The authority inherent in the equity powers guarantees complete rather than truncated justice. *Camp v. Boyd*, 229 U.S. 530, 551, 33 S.Ct. 785, 793, 57 L.Ed. 1317 (1913). *The power of a district court to require restitution,* as was pronounced in *United States v. Lieb*, 333 F.Supp. 424 (W.D.Tex. 1971), *was specifically endorsed and ratified by Public Law 92-210* [5] (Footnote 5, *See* U.S. Code and Congressional News, 92d Congress, 1st Session (1971) pp. 2283, 2291.) (Sec. 209), but nothing has been pronounced as to payment to the United States Treasury. *Federal district courts unquestionably possess broad discretion in fashioning equitable remedies, Franks v. Bowman Transportation, Co.*, 424 U.S. 747, 764, 96 S.Ct. 1251, 1264, 47 L.Ed.2d 444 (1975) but, as contemplated in the exercise of these powers to remedy civil wrongs and restore civil rights, the authority is vested to make the victims whole, 'so far as possible, and restored to a position where they would have been had it not been for' the unlawful violation, such as was practiced here. It follows that payment to the United States Treasury is not restitution, in the true sense of the word, or in the objectives of the statutes here involved. (Emphasis added.)

"We face the brilliant rationale of the trial court in its envision of millions of customers along the east coast having been overcharged. Clear, however, is the fact that the sale of the over-priced oil was made to determinable utilities and other institutions along the Atlantic seaboard. Faced with a statute that spe-

cifically authorizes restitution, but makes no provision for direct payment to the treasury, we turn to *University of Southern California, supra,* which ordered refunds of excess charges for football tickets.

> 'While this Court recognizes the considerable burden that such a refund demand places . . . we recognize also the right of the agencies to require it.'

Id. at 1070.

We believe such a process to be a reasonable application of the power of the district court. This is obviously in the contemplation of defendant as evidenced by its request for relief. Actions by the United States under ESA § 209 are taken to enforce public, not private, rights. Thus, compensation is 'a by-product of the agency's effort to re-establish compliance with its regulatory scheme.' *Bulzan, supra,* at 282. The central purpose of restitution is to determine the amount by which the wrongdoer has been unjustly enriched, and then to make him disgorge that amount. No proof is required that the plaintiff was damaged, much less the amount of any damage:

> 'Restitution is generally awarded only in order to deprive the defendant of enrichment obtained at the plaintiff's expense . . . the general requirement does not mean that the gain to the defendant need be equated to the loss of the plaintiff, nor indeed that there need be any loss to the plaintiff except in the sense that a legally protected interest has been invaded.'

Restatement of Restitution, Sec. 1, Comment e (1937), cited in *Sauder v. Doe,* 648 F.2d 1341 (TECA 1981). The district court properly held that because NEPCO and PETCO aided and abetted the Chamberlain firms in their violation of the price regulations, for their material benefit, they are barred by 'unclean hands' from seeking or recovering any of the illegal profits.

"Apparently, however, restitution payments may be made to the Treasury under special order of the court. The Treasury holds the payments in a 'Deposit Fund Account' to be paid out at the direction of DOE. *See* General Account Office Procedures Manual, Title 7, Sec. 4.10(6). *Cf. Hodgson v. Wheaton Glass Co.*, 446 F.2d 527, 535 (3d Cir. 1971).[6] (Footnote 6, *See also* 28 U.S.C. §§ 2041, 2042.) Receipts contained in those accounts are subject to a 'constructive trust,' *Emery v. United States*, 186 F.2d 900, 902 (9th Cir. 1951); are treated as liabilities of the United States, *see e.g.*, Treasury Combined Statement of Receipts, Expenditures, and Balances of the United States Government, Fiscal Year 1978 at 3, 12; and for their disbursement, an appropriation is not required. This affords an opportunity for DOE to pursue those proposals suggested by its request that the Court

> 'Enter a judgment requiring Gathering, Services and Chamberlain to pay into an escrow account for subsequent distribution to NEPCO customers, a sum of. . .'

As determined by the district court the Government has demonstrated injury to a class of persons. Whether the defendant will ask to amend under Rule 15, Federal Rules of Civil Procedure, institute interpleader under Rule 22 and related statutes, or proceed otherwise is not revealed in the record before this Court. Suffice it to note that the Government has a *duty* to try to ascertain those overcharged, and refund them, with interest, from the restitution funds.

"The Order of the district court is modified and the case remanded to that forum for an Order directing the application to the General Accounting Office Procedures, and/or the furnishing of a plan for the 'Deposit Fund Account', and/or other appropriate procedures, to be approved by the district court.

"Meanwhile, within such time as the district court may direct, the parties will enter a stipulation, failing which, file appropriate motions in that forum." *Citronelle*, 669 F.2d at 721-723.

The only different circumstances in this case that did not exist in the *Citronelle* case, *supra*, are the "decontrol" of petroleum prices and allocations in 1981 and the many changes in the statutes and regulations, and in the structure, operations, personnel, remedial policies and administrative decisions which governed the Department of Energy and its predecessors prior to "decontrol" (or "deregulation") of the petroleum industry on January 28, 1981. The effect on restitution by judicial orders of these changed circumstances since "decontrol" are discussed hereinafter in reviewing the currently available remedies and procedures to accomplish judicial restitution.

The following additional decisions of this Court on the issues of restitution are substantially in agreement with the principles announced in the *Citronelle* case, *supra*. They are in inverse chronological order: *United States v. Pro Football, Inc.*, (TECA 1975) 514 F.2d 1396, an action under § 209 ordering restitution of excess charges for football tickets; *DeRieux v. Five Smiths, Inc.*, (TECA 1974) 499 F.2d 1321, cert. denied, 419 U.S. 896, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974), ordering restitution of excess charges for football tickets; *University of Southern California v. Cost of Living Council*, (TECA 1972) 472 F.2d 1065, cert. denied, 410 U.S. 928, 93 S.Ct. 1364, 35 L.Ed.2d 590 (1973), ordering restitution of excess charges for football tickets; and *United States v. Lieb*, (TECA 1972) 462 F.2d 1161, ordering restitution of rents in excess of rent guidelines.

C.

TECA Opinions Relied on in the Majority Opinion in Part "X. The Remedy."

In the majority opinion in Part "X. The Remedy," the majority concludes that it was within the discretion of

the District Court to enter summary judgment (a) denying intervention; (b) refusing to grant a hearing in restitution proceedings to those claiming to be injured by the illegal overcharges; (c) and assuming without a hearing that all illegal overcharges had been spread "through the distribution chain, to the ultimate consumers" and (d) that the overcharges should be paid to the Treasury in escrow to dispense the funds to the States, by analogy to P.L. 97-377, § 155 (the "Warner Amendment").

It is concluded in this dissent that the majority erred in concluding that the District Court in its Memorandum Opinion of March 25, 1983, 561 F.Supp. 816 had *discretion*, without notice and hearing, to enter a summary judgment in conflict with (a) controlling decisions of the Supreme Court of the United States on Due Process; (b) historic equitable principles; (c) the controlling opinions of this Court; and (d) the last sentence of § 209 of the Economic Stabilization Act, *supra*, discussed hereinabove. The discussion, cases cited, statute cited, and conclusions expressed in Parts II and III of this dissenting opinion on Due Process, equitable principles of restitution and intervention are incorporated at this point by reference. They will not be repeated in this Part I, except to the extent necessary in distinguishing the cases relied on by the majority in Part "X. The Remedy."

The following cases are relied on by the majority in Part "X. The Remedy": *Cities Service Co. v. Department of Energy*, (TECA 1983) 715 F.2d 572; *Dyke v. Gulf Oil Corporation*, (TECA 1979) 601 F.2d 577; *Bulzan v. Atlantic Richfield Co.*, (TECA 1980) 620 F.2d 278; *Citronelle-Mobile Gathering, Inc. v. Edwards*, (TECA 1982) 669 F.2d 717; *Cities Service Co. v. Federal Energy Administration*, (TECA 1975) 529 F.2d 1016.

In a supplemental letter[5], the author of the majority opinion cited these additional cases in support of the majority opinion on "The Remedy": *Payne 22, Inc. v. United States of America*, (TECA 1985) 762 F.2d 91; *Midwest Petroleum Co. v. DOE*, (TECA 1985) 760 F.2d 287.

None of these TECA cases, it is submitted, support the conclusions in the majority opinion or could serve as a precedent to hold that the District Court had *discretion* to render a summary judgment contrary to (a) Due Process guaranteed by the Constitution; (b) controlling decisions of the Supreme Court and of this Court on historic equitable principles; and (c) the last sentence of § 209 affirming historic controlling equitable principles on restitution.

The discussion of all the cases relied on by the majority follows.

Cities Service Company v. Department of Energy (Cities Service), (TECA 1983) 715 F.2d 577

The *Cities Service* case, *supra*, rules only on the right of intervention and the facts in the *Cities Service* case, *supra*, were distinguished from this case in that:

(a) the counterclaim in the *Cities Service* case under § 209 was *settled* by an Agreed Final Judgment (715 F.2d at 573 and 574), that provided for payment of an agreed sum to the U.S. Treasury;

(b) the District Court found that Cities Service Company "*had no 'interest'* within the meaning of Fed.R.Civ.P. 24(a)(2)," in contrast to the finding

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[5] The two cases distinguished in this part are not in the original draft of the majority opinion but were cited by the author of the majority opinion in a letter submitted after circulation of the original draft. Because they may be added to the original draft, they are included in this part.

in this case that the intervenors *had an interest* as defined by Rule 24(a)(2) (R. 31607); and

(c) the rule of the controlling TECA case of *Citronelle-Mobile Gathering, Inc. v. Edwards, supra*, 669 F.2d 717, cert. denied 459 U.S. 877, 103 S.Ct. 172, 74 L.Ed.2d 141 (1982), is recognized but distinguished because of the different facts stated above.

The *Cities Service* case, *supra*, is relied on by the majority to support the questionable conclusion that a party, entitled to a hearing on principles of Due Process, restitution and equitable principles of restitution in an action under § 209, has only a private action under § 210. But there is no case holding that any party that has rights under § 210 is not entitled to a hearing in restitution under § 209, under constitutional and equitable principles, principles of procedural Due Process, and the last sentence of § 209 when the illegal overcharges are in the control of the court.

No reconciliation of the ruling of the majority, remitting the victims of the illegal overcharges to separate civil suits under § 210[6] is made by the majority with the controlling cases of the Supreme Court of the United States, in restitution, represented by *Public Service Commission of Missouri v. Brashear Freight Lines, supra*, 312 U.S. 621, 61 S.Ct. 784, 85 L.Ed. 1083, a restitution proceeding in which such a ruling such as that of the majority was reversed by the Supreme Court of the United States, which said:

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[6] The logical result of the finding of the majority that all members of the public were victims of the overcharges and that each victim is limited to relief in a private action for damage under § 210 is that there are hundreds of millions of claims for relief for damages, a large number of which may be the subject of judicial actions, which would impose great and unbearable burdens on the judiciary and great financial burdens on the victims of the illegal overcharges and the parties liable to the victims.

"There can be no question of that judge's right to deal with issues such as those here presented. Under long settled equity practice, courts of chancery have discretionary power to assess damages sustained by parties who have been injured because of an injunctive restraint ultimately determined to have been improperly granted. Russell v. Farley, 105 US 433, 444 et seq., 26 L ed 1060, 1064; Pease v. Rathbun-Jones Engineering Co. 243 US 273, 279, 61 L ed 715, 721, 37 S Ct 283, Ann Cas 1918C 1147. This power is, as stated, discretionary; there are of course cases where the Chancellor might properly conclude that parties should be remitted to an action at law. *But this is not one of those cases.* If petitioners had to bring actions at law, each of the seventy-six respondents might have to be made a defendant in a separate action. There is a controversy between the parties as to whether or not all of these respondents could be sued or served in the State of Missouri; to be compelled to sue some of them elsewhere would work a hardship on the state. *In addition to this, part of the damages for which petitioners seek recovery is made up of various items of cost and expense incurred in the litigation; if petitioners succeed on the merits, there might conceivably be serious problems raised by the seventy-six respondents as to the portion of damages fairly attributable to each—a problem peculiarly appropriate to equity, and pre-eminently adapted to settlement by a single court.*" 312 U.S. at 629-630, 61 S.Ct. at 788-789, 85 L.Ed. at 1088 (emphasis added).

As pointed out above in Part II A. hereof, the rule of the Supreme Court on equitable historic doctrine of restitution in maximum price enforcement actions (all actions under § 209) is the same in injunction actions in which the injunction is later set aside, and overcharges are in an escrow fund. See *Porter v. Warner Holding Company, supra,* 328 U.S. 325 at 398, 66 S.Ct. 1086 at 1089, 90 L.Ed. 1332 at 1337, for analysis and quotation stating controlling rule.

Dyke v. Gulf Oil Corporation (Dyke),
(TECA 1979) 601 F.2d 557

The actions involved in the *Dyke* case, *supra*, were private actions under § 210, wholly unlike the *Exxon Corporation* action under review and obviously distinguishable on this fact alone.

Further in the *Dyke* case, *supra*, this Court held that DOE may not be joined as a party in § 210 actions in the absence of compelling circumstances not present in that case. The *Dyke* opinion reiterates generally the "separation of public and private remedies" language, but does not discuss the issues of restitution under § 209.

There is an obvious distinction to be drawn between "commingling of private and agency enforcement devices" proscribed in the *Dyke* opinion, 601 F.2d 557 at 567, and the hearing of victims' claims to restitution under historic equitable and constitutional principles in a § 209 action, in which restitution may be made properly and accurately, as authorized in the last sentence of § 209.

Bulzan v. Atlantic Richfield Company (Bulzan),
(TECA 1980) 620 F.2d 278

This action by the plaintiff Bulzan was again a private action under § 210, and wholly distinguished from the action under review, in which relief was secured on a claim under § 209.

This Court in its opinion in the *Bulzan* case, *supra*, held that a remedial order by the agency does not bar a private action under § 210, because of the "dual enforcement scheme that Congress incorporated into its regulatory plan." *Bulzan*, *supra*, 620 F.2d at 284.

The *Bulzan* case arose out of an agency remedial order which required the violator to make compensation to the injured private party. It is very clear from the *Bulzan* opinion that restitution under § 209 is to be made in the

action under § 209 to injured parties, for the opinion states that an award under § 210 may be adjusted to take into account that type of earlier award under § 209. *Bulzan, supra,* 620 F.2d at 283-284.

Citronelle-Mobile Gathering, Inc. v. Edwards (Citronelle), (TECA 1982) 669 F.2d 717

The holding of this case is directly contrary to the conclusion reached by the majority. The *Citronelle* case is discussed as a controlling case of this Court earlier in this dissenting opinion in Part I B. on judicial equitable principles of restitution. This earlier discussion is incorporated here by reference, and the following additional comment is made here.

On facts similar to those in these appeals, the TECA Panel in *Citronelle, supra,* rejected the argument that it was impossible to make restitution to the injured parties because they were too numerous. The Court in the *Citronelle* case, *supra,* stated:

> "We face the brilliant rationale of the trial court in its envision of millions of customers along the east coast having been overcharged." *Citronelle, supra,* 669 F.2d at 722.

But this Court, in the *Citronelle* case, did not give up and stop at the possibility that millions of persons were overcharged; on the contrary the Court went on to state:

> "Clear, however, is the fact that the sale of the overpriced oil was made to determinable utilities and other institutions along the Atlantic seaboard. Faced with a statute that specifically authorizes restitution, but makes no provision for direct payment to the treasury, we turn to *University of California, supra,* (472 F.2d 1065) which ordered refunds of excess charges for football tickets.
>
> While this Court recognizes the considerable burden that such a refund demand places . . .

> we recognize also the right of the agencies to require it.
>
> *Id.* at 1070.
>
> We believe such a process to be a reasonable application of the power of the district court." *Citronelle, supra*, 669 F.2d at 722.

In the above quotations this Court held that the District Court in restitution proceedings must look for any identifiable victims of the overcharges, and that it makes no difference if the wrongdoer is caused "considerable burden" in making refunds.

The opinion in the *Citronelle* case, *supra*, goes on to state in 669 F.2d at 723 that "the Government has a *duty* to try to ascertain those overcharged. . . ." This statement is the basis of the holding that the District Court must implement that duty by a judgment in restitution.

Cities Service Company v. Federal Energy Administration (Cities Service), (TECA 1975) 529 F.2d 1016

The *Cities Service* case, *supra*, did not involve an action under § 209 or issues of restitution, due process or intervention, as in this case. The *Cities Service* case, *supra*, was an action to enjoin enforcement of the old oil Entitlements Program.

The opinion in the *Cities Service* case, *supra*, states that the basic purpose of the Entitlements Program was to spread the burden of uncontrolled oil prices among "all sectors of the petroleum industry, all regions of the country, and among all consumers of petroleum products," *Cities Service*, 529 F.2d at 1021. The *Cities Service* opinion states that all sectors of the petroleum industry were to bear the burden of increased oil prices and nowhere states that consumers were to bear the entire burden of

price increases or that a district court could summarily find that unidentified "ultimate consumers" were the only victims of illegal overcharges. Moreover, the language quoted above in the *Cities Service* case, *supra*, is addressed to the purpose of the Entitlements Program, and there is no evidence that reality inevitably conformed to the intentions of the agency in promulgating the Entitlements Program.

Further, the facts discussed in the recent entitlements exception regulations 10 C.F.R. 211.69 [*sic*] cited in Addendum No. 2 hereof, including the Entitlements Adjustment Mechanisms, are contrary to the inferences drawn in the majority opinion from the *Cities Service* case, *supra*. For example, under 10 C.F.R. § 211.69, DOE authorizes and may pay out of illegal overcharge funds restitution of benefits owing but unpaid as exception relief from the Entitlements Program.

Midwest Petroleum Company v. U.S. Department of Energy (Midwest)
(TECA 1985) 760 F.2d 287

In the *Midwest* case, *supra*, there *was no finding that there were illegal overcharges* by Fina, the seller, in any amount. As clearly recited in the opinion of this Court, "[w]ithout any finding that Fina was in fact liable for any overcharges, DOE and Fina agreed to the Consent Order at issue in this case." *Midwest, supra*, 760 F.2d at 288. The consent order *provided for payment of damages from illegal overcharges to alleged victims.* Thereafter the proposed consent order was published for comment in the Federal Register. Notice of adoption of the Order by DOE was later published in the Federal Register. Each of the appellants including Midwest accepted the settlement, and signed a release giving up the right to sue separately under § 210 or the federal petroleum

price regulations "based on any 'act, matter, case, statement, conduct, practice or thing whatever. . . .'" *Midwest, supra,* 760 F.2d at 289. The action by Midwest was to rescind the releases for illegality and fraud. The holding was that the releases were valid and that there was no proof "that the $14 million settlement represented . . . overcharges." *Midwest, supra,* 760 F.2d at 292. The *Midwest* case is not in point in this case where there was a finding of overcharges, no release, and no grounds shown to rescind a release given by any victim of the overcharges.

Payne 22, Inc. v. United States of America (Payne 22), (TECA 1985) 762 F.2d 91

The facts in this case were essentially like those in the preceding *Midwest* case, *supra.* The *Payne 22* case, *supra,* involved (a) a Consent Order signed by the seller Sun Oil Company and DOE; (b) a finding by DOE of no evidence of overcharges; (c) a payment of refunds to certain purchasers of crude oil; (d) publication of the Consent Order in the Federal Register for comment; (e) a failure to comment by Payne 22; (f) publication of adoption of the Consent Order by DOE; and (g) a class action fifteen months later by Payne 22. This case is obviously not in point. Further the Court in the *Payne 22* case clearly and expressly distinguished that case from *Citronelle-Mobile Gathering, Inc. v. Edwards, supra,* in the following words:

> "Payne cites *Citronelle-Mobile Gathering, Inc. v. Edwards,* 669 F.2d 717 (Temp. Emer. Ct. App.) *cert. denied,* 459 U.S. 877 (1982) to support its contentions. There, however, the district court concluded that Citronelle had violated the Regulations and determined who had been overcharged. Here, on the contrary, in the Consent Order the DOE alleges no

violations by Sun and Sun denies any violations of the Regulations." *Payne 22, supra*, 762 F.2d at ——.

This quotation supports the differing conclusions of this dissenting opinion rather than those of the majority.

D.

Selected Leading Cases from Circuit Courts of Appeals on Duty and Power to Order Restitution

The following leading cases of the Circuit Courts of Appeals of the United States define the duty and power of a District Court, improperly issuing an injunction, to order restitution of damages caused thereby, to the parties suffering the damages: *Middlewest Motor Freight Bureau v. United States* (*Middlewest*), (C.A.8 1970) 433 F.2d 212, cert. denied, 402 U.S. 999, 91 S.Ct. 2169, 29 L.Ed.2d 165 (1971); *Coyne-Delaney Co. Inc. v. Illinois Capital Development Board*, (C.A.7 1983) 717 F.2d 385 at 390-392; *State of Tennessee ex rel. Leech v. Dole*, (C.A.6 1984) 749 F.2d 331 at 337; *U.S. v. Coca-Cola Bottling Company of Los Angeles*, (C.A.9 1978) 575 F.2d 222 at 228, cert. denied, 439 U.S. 959, 99 S.Ct. 362, 58 L.Ed.2d 351 (1978); *Commodity Futures Trading Commission v. Hunt*, (C.A.7 1979) 591 F.2d 1211, cert. denied, 442 U.S. 921, 99 S.Ct. 2848, 61 L.Ed.2d 290 (1979); *Securities and Exchange Commission v. Texas Gulf Sulphur Company*, (C.A.2 1971) 446 F.2d 1301 at 1307, cert. denied, 404 U.S. 1005, 92 S.Ct. 561, 30 L.Ed. 2d 558 (1971); *Moss v. Civil Aeronautics Board*, (C.A. D.C. 1975) 521 F.2d 298 at 306, cert. denied, 424 U.S. 966, 96 S.Ct. 1460, 47 L.Ed.2d 732 (1976); *Interstate Commerce Commission v. B & T Transportation Co.*, (C.A.1 1980) 613 F.2d 1182.

These cases confirm the uniform application of the equitable duty and power to order restitution in injunc-

tive actions against enforcement as well as in enforcement actions. In all of the injunction cases, the inherent duty and power of the District Court to make restitution, to devise procedures, and to make equitable awards for the purpose of restitution, were recognized by the Circuit Courts of Appeals.

In the *Middlewest* case, *supra*, for example, the Court of Appeals stated the generally recognized principles of restitution as follows:

> "IV. RESTITUTION AS A REMEDY FOR LOSSES SUFFERED BY VIRTUE OF AN INJUNCTION
>
> "The issuance of an injunction will in many cases cause financial losses to interested parties as well as prevent irreparable injury to the procurers. More importantly in cases such as this, where the restraint is directed against an order of an administrative agency charged with regulating rates to be charged to the public at large, the injunction may cause substantial losses to the general public which can never be adequately compensated. In such cases, it is the duty of the court issuing the injunction to take necessary measures to protect the interests of parties before it, as well as the public interest. (This was done in this case by the issuing judge prudently requiring a substantial bond before issuing the temporary restraining order. The temporary restraining order is customarily issued, and usually ex parte, to maintain the status quo pending a detailed review on the merits.)
>
> "For some time, it was thought to be the law in the federal courts that the only remedies available to parties injured by the issuance of an injunction were an action for damages on the injunction bond, if one had been required, in which case the amount recoverable was limited to the amount of the bond,

or in the absence of a bond, an action for malicious prosecution where applicable. Russell v. Farley, 105 U.S. 433, 26 L.Ed. 1060 (1881). The substantial limitations inherent in these remedies are readily apparent.

"But in 1919, the Supreme Court significantly expanded the protection to be accorded injured parties by allowing recovery in the nature of restitution in cases where that remedy might be appropriate. Arkadelphia Milling Company v. St Louis S. W. Ry. Co., 249 U.S 134, 39 S.Ct. 237, 63 L.Ed. 517 (1919)." *Middlewest*, 433 F.2d 212 at 225.

The additional cases from the Circuit Courts of Appeals of the United States, cited above, are in agreement with the holding in the *Middlewest* case, *supra*, quoted above.

E.

Selected Controlling General Authorities on Duty and Power to Order Restitution in Equitable Injunctive Actions and Enforcement Actions

The general legal authorities on the subject of restitution are in agreement with the controlling judicial authorities of the Supreme Court of the United States, of this Court and of the Circuit Courts of Appeals reviewed above. This is demonstrated by the following generally recognized authorities: *Restatement of the Law of Restitution*, Topic 1, Underlying Principles and § 74 applying to judgments reversed or set aside, *Restatement of the Law of Restitution 2d* (Tentative Draft No. 1, April 1983), § 1 on Underlying Principles of Restitution, § 1(e) *Fault and wrongful conduct* at pages 13 and 14, § 1(i) *Source of benefit* at pages 22 and 23; II Palmer, *The Law of Restitution* (1978) § 9.19 at pages 290 and 291 on judgments subsequently reversed or set aside; Moore's *Federal Practice*, Second Edition, ¶ 38.11[6] note 8 and ¶ 65.10[1].

II

CONTROLLING DECISIONS ON NATURE OF REQUIRED HEARINGS FOR RESTITUTION

A.

Selected Controlling Decisions of the Supreme Court of the United States on the Nature of the Right to Restitution of Parties Damaged by Violations of Valid Statutes or Regulations or Both

It is a conclusion of this dissent that with the duty and power of district courts to order restitution in enforcement and injunction actions, there exists a correlative right in parties damaged to restitution in judicial actions whether enforcement actions (including those authorized by § 209 of the ESA) or private injunction actions against enforcement, in which the injunction is improperly issued. To further define the remedies available for these rights to restitution, it is necessary and desirable to determine the nature of these rights to restitution in the federal constitutional sense and in the federal equitable sense.

The right to recover monetary and other damages caused by a violation of law, including a legal administrative regulation, is a property right protected by the Due Process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States (and perhaps other clauses).

A recent controlling decision of the Supreme Court of the United States that the nature of these rights to restitution of monetary and other damages is a property right under the Due Process clauses is *Logan v. Zimmerman Brush Company* (*Logan*), 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), in which the Supreme Court stated that "a cause of action is a species of property"

citing *Mullane v. Central Hanover Bank and Trust Company* (*Mullane*), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The Supreme Court in *Logan, supra*, went on to state:

> "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." 455 U.S. at 429, 102 S.Ct. at 1159, 71 L.Ed.2d at 273.

Civil litigants who seek judicial restitution by recourse to the courts are seeking to protect a property right. Other decisions supporting this basic classification of a cause of action or claim for damages as a property right are: *Mullane, supra*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Cleveland Board of Education v. Loudermill* (*Loudermill*), 460 U.S. ——, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

The recognized texts on constitutional law in accord are: Nowak, Rotunda and Young, *Constitutional Law* (Second Edition) Chapter 15, Section II D, 546-553; Antieau, *Modern Constitutional Law*, § 7:11 to § 7:16, 540-548 in terms of "Civil Justice"; Tribe, *American Constitutional Law*, § 10-8 to § 10-11, 506-532, tracing the historical development of procedural due process in the context of protected interests.

B.

Selected Controlling Decisions on the Nature and Scope of Right to Due Process of Those Damaged by Violations of Valid Statutes or Regulations or Both

Having recognized that the parties damaged by violations of statutes or regulations, or both, have the right to Due Process under the Fifth Amendment and under historical jurisprudence, this dissenting opinion must de-

fine the procedural due process to which they are entitled. Each party that may have a federal claim for restitution is entitled under the Due Process clause of the Fifth Amendment to notice and an opportunity for a judicial (or quasi-judicial administrative) hearing and decision on the claim for restitution. The selected controlling decisions of the Supreme Court of the United States defining the basic procedural due process rights required in federal judicial actions are as follows:[7] *Logan, supra,* 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); *Mullane, supra,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Loudermill, supra,* 470 U.S. ——, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

In *Logan, supra,* the Supreme Court stated:

> "Justice Jackson, writing for the Court in Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950), observed: 'Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Id., at 313, 94 L Ed 865, 70 S Ct 652. At the outset, then, we are faced with what has become a familiar two-part inquiry: we must determine whether Logan was deprived of a protected interest, and, if so, what process was his due.
>
> "The first question, we believe, was affirmatively settled by the Mullane case itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan,* 455 U.S. at 428, 102 S.Ct. at 1153, 1154, 71 L.Ed.2d at 273 (footnote omitted).

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[7] A similar administrative procedural right to due process required of regulatory administrative agencies exercising delegated quasi-judicial functions will be discussed hereinafter.

C.

Selected Controlling Decisions on the Type of Hearing on Claims for Restitution Required by Procedural Due Process in Judicial Actions in Which Injunctions are Improperly Issued Before Final Judgment

In the controlling cases cited in Part I A., *Selected Controlling Decisions of Supreme Court of the United States on Duty and Power to Order Restitution*, it is uniformly held that the District Court has the duty and flexible equitable power to do equity and mould each decree to the necessities of the particular case, so long as procedural due process is accorded all persons claiming constitutionally protectable property and other rights. For example, in an equitable private enforcement action, similar in substance to an action under § 209, the District Court was ordered to employ all its equitable powers of a broader and more flexible character than usual because of the public interest. *Warner Holding, supra*, 328 U.S. at 398, 66 S.Ct. at 1089, 90 L.Ed. at 1336, 1337. And in *Morgan II, supra*, 307 U.S. at 193, 194, 59 S.Ct. at 801, 83 L.Ed. at 1218, 1219, the Supreme Court stated the manner of moulding the remedies in the District Court, a court of equity, performing its duties to order restitution, may be affected by the public interest involved.

Under familiar principles of procedural due process, the Supreme Court has consistently held that under the Due Process clauses, in addition to notice, *some form of hearing* is required before an individual or other party can be deprived of a property interest. *Matthews v. Eldridge* (*Eldridge*), 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Goldberg v. Kelly* (*Goldberg*), 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); *Loudermill, supra*, 470 U.S. ——, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). In *Eldridge, supra*, the rule was summarized as follows:

"This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. Wolff v McDonnell, 418 US 539, 557-558, 41 L Ed 2d 935, 94 S Ct 2963, 71 Ohio Ops 2d 336 (1974). See, e.g., Phillips v Commissioner, 283 US 589, 596-597, 75 L Ed 1289, 51 S Ct 608 (1931). See also Dent v West Virginia, 129 US 114, 125-125, 32 L Ed 623, 9 S Ct 231 (1889). The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' Joint Anti-Fascist Comm. v McGrath, 341 US 123, 168, 95 L Ed 817, 71 S Ct 624 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' Armstrong v Manzo, 380 US 545, 552, 14 L Ed 2d 62, 85 S Ct 1187 (1965). See Grannis v Ordean, 234 US 385, 394, 58 L Ed 1363, 34 S Ct 779 (1914)." *Eldridge*, 424 U.S. at 333, 96 S.Ct. at 902, 47 L.Ed.2d at 32.

D.

Selected Controlling Decisions on the Nature of Required Hearings for Restitution in Judicial Actions in Which No Injunction was Issued Before Final Judgment

In judicial actions in federal courts involving restitution of charges and other injuries caused by a violation of a statute or regulation, or both, fixing maximum charges, the type of hearing required in addition to notice must be adequate to satisfy the procedural Due Process clause of the Fifth Amendment, but is flexible and may be devised to satisfy the existing circumstances and the

public interest. *See Warner Holding, supra,* 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946); *Morgan II, supra,* 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211 (1939); *Eldridge, supra;* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Goldberg, supra,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); and *Loudermill, supra,* 470 U.S. ——, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); at the pages cited above.

E.

Selected Controlling Decisions on the Nature of Required Hearings for Restitution in Administrative Proceedings

In many instances a fully functioning regulatory administrative agency of the Executive Branch may exercise statutorily delegated quasi-judicial functions, as well as delegated quasi-executive functions.[8] Before decontrol (or "deregulation") in January 1981 and for some time thereafter, the Department of Energy (DOE) exercised such quasi-judicial functions in determining violations and providing remedies for victims of violations. These functions were performed through proceedings for Notice of Probable Violations (NOPV), hearings thereon and proposed Remedial Orders. See Subpart V, 10 CFR § 205.280 through § 205.288 (1983), on administrative procedures of DOE for notice and hearing on alleged violations; See also Subpart O, 10 CFR § 205.190 through § 205.199J (1983), on procedures for administrative remedial action and orders.

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[8] 1 Mezines, Stein & Gruff, *Administrative Law* § 1.01, 1-2 note 2, relying on and citing *The Nature of Administrative Law* by E. Barrett Prettyman, 44 Va. L. Rev. 685 (1958). Judge Prettyman was Chairman of the President's Conference on Administrative Procedure, 1953-1955. Also see Schwartz, *Administrative Law,* Second Edition § 5.6.

Properly applied, these quasi-judicial administrative procedures of DOE, subject to judicial review by the federal courts under the Administrative Procedure Act, were adequate to provide procedural Due Process under the Fifth Amendment. For examples, see the decision of this Court in *Missouri Terminal Oil Company v. Edwards*, (TECA 1981) 659 F.2d 139, and Edles & Nelson, *Federal Regulatory Process*, Chapter 5 and 1984 Supplement.

The very recently published work 1 Koch, *Administrative Law and Practice* (West Publishing Company 1985), Chapter 7, §§ 7.1 to 7.8 contains an excellent exposition of the historical and expanding application of the Due Process clause of the United States Constitution to administrative processes. Among other citations, this work cites cases of the Supreme Court of the United States from *Mullane, supra*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed 865 (1950), to *Eldridge, supra*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), followed in this dissenting opinion.

But following decontrol in January 1981, the change in personnel, policies, regulations, procedures and the practices of DOE has changed the administrative processes which provided restitution to the victims of violations. These changes have drawn DOE and the violators of statutes and regulations into new controversies about the sufficiency and legality of the actions of DOE, violators and alleged violators of statutes and regulations, under the duty and obligation to make restitution as declared by the controlling decisions of the Supreme Court of the United States and of this Court, summarized above.

III

DECISIONS AND AUTHORITIES ON INTERVENTION AND INTERPLEADER

A.

Rights of Claimants to Damages to Intervene in Restitution Proceedings and to Notice and Opportunity to be Heard in District Court

Following the filing on March 25, 1983 of its decisive Memorandum Opinion reported in 561 F.Supp. 816-864, containing comprehensive findings of fact and conclusions of law, the District Court directed plaintiff DOE to submit a form of proposed judgment in 15 days, 561 F.Supp. at 859. Defendant Exxon was ordered to file its reply thereto within 10 days thereafter. 561 F.Supp. at 859. The District Court, without allowing intervention and without notice to or opportunity for hearing by claimants to restitution of damages caused by Exxon's violations, in the Memorandum Opinion of March 25, 1983 found the facts that restitution to any of the victims of the overcharges was impossible in the following excerpt:

> "At the same time, price regulations applicable to refiners allowed them to pass along the inflated costs of Hawkins Field crude oil to purchasers of refined products. Under those rules the price a refiner could charge for a refined product was generally limited to the refiner's May 15, 1973 price plus, among other costs, the increased cost of crude oil. 10 C.F.R. § 212.83(c)(2)(iii). Similar pass-through provisions for increased costs also applied to crude oil resellers, product resellers and retailers. *See* 10 C.F.R. Part 212, Subparts F and L. As a result of the pervasive system of price controls which then existed, therefore, Exxon's overcharges were not, as it simplistically asserts, borne by Exxon itself, but instead were

borne by ultimate consumers of petroleum products throughout the entire country.[56]

> (Footnote) "56 on November 23, 1982 and on January 20, 1983, certain refiners and independent retailers, respectively, filed motions to intervene in this action, arguing that they as victims of the Hawkins Field overcharges were entitled to any recovery DOE might obtain. *The preceding discussion shows, however, that due to the workings of regulations applicable throughout the oil industry, from producer to retailer, the real victims are the unidentifiable millions of ultimate consumers of petroleum products.* Accordingly, the motions to intervene are denied. (Emphasis added.)

> "The broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each. Yet this court is still faced with the task of fashioning an equitable remedy." 561 F.Supp. at 853.

The findings of fact and conclusions of law of the Memorandum Opinion of March 25, 1983 were incorporated without change by reference, in a "JUDGMENT," entered June 7, 1983, which did not mention expressly any claims to restitution or pending petition and counterclaim for interpleader. R. 31658-60. The judgment of June 7, 1983 recites that "the matter came before the Court on the parties' cross-motions for summary judgment," referring to the motions for summary judgment of the United States and Exxon described in the Memorandum Opinion. 561 F.Supp. at 818. The judgment of June 7, 1983, at R. 31659, implemented by reference the finding, quoted above, made without hearing the claimants to restitution, that "[t]he broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of overcharges to their ultimate victims and the calculation of the *precise* damages suffered by each." 561

F.Supp. at 853 (emphasis added). No authority is cited for the assumption that damages to the victims must be *precisely*[9] calculated. On this basis the District Court in the judgment of June 7, 1983 ordered the overcharges of $1,635,604,638.10 and interest to be deposited by Exxon "into an interest-bearing Treasury escrow account" to be "held in trust by the Treasury" to be disbursed to each of the States and other eligible jurisdictions pursuant to instructions "consistent with this court's Memorandum Opinion of March 25, 1983. . . ." R. 31659.[10] Review of the propriety of the proceedings on restitution issues, intervention and interpleader requires a summary of the record in the District Court, which follows.

B.

Orders of the District Court Denying and Allowing Intervention, Imposing Limitations on Intervenors and Dates Thereof

Before the filing of the Memorandum Opinion of March 25, 1983, the District Court had stayed the filing of applications to intervene by industry applicants. R. 38985, 39006. Later on April 29, 1983, the District Court belatedly but properly found the applications to intervene to be timely and that the applicants, who are intervenor-appellants herein, had a right to intervene under Rule 24(a)(2). In each instance, the intervention of right

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[9] The law may require only proof of damages by a preponderance of the evidence "with a reasonable certainty." 22 Am.Jur.2d *Damages*, § 22, pages 40-42. The degree of certainty required may be less when the uncertainty is caused by the party at fault. 22 Am.Jur.2d *Damages*, § 23.

[10] In an Order dated June 17, 1983, the District Court found that "plaintiff and intervenors will not be prejudiced by the issuance of an unsecured stay" and ordered the June 7, 1983 judgment stayed "pending final disposition of all appeals in this case and for a period of 30 days following the issuance of a mandate. . . ." R. 31665.

was properly granted but, this dissenting opinion concludes, contrary to law the intervention was limited to intervention for the purposes of appeal on the remedy issue only (with a limited privilege to comment by some intervenors). R. 31607-12. A summary of these orders follows:

1. Orders Denying Intervention Before Judgment of June 7, 1983.

The District Court on March 25, 1983 in its Memorandum Opinion denied in note 56 "motions" (properly, applications) to intervene, filed November 23 or 24, 1982 and January 20, 1983, for purposes of restitution described later of "certain refiners" and "independent retailers." These applicants claimed to be victims of the overcharges later found to have been made by Exxon. The denial of these applications was based on the finding, made without an opportunity by the applicants for intervention to be heard, that "the real victims are the unidentifiable millions of ultimate consumers of petroleum products." 561 F.Supp. at 853, note 56, quoted in full above, and expanded in the text, 561 F.Supp. at 853, 854.

One of the "motions" (properly, applications) to intervene denied in note 56 of the Memorandum Opinion of March 25, 1983 was the Conditional Motion of Indicated Refiners to Intervene filed November 23 or 24, 1982 (stated in note 56 as November 23, 1982). R. 38960-65. This motion (application) to intervene was conditioned only on a decision of the Court granting judgment for plaintiff that defendant has violated the crude oil price regulations of DOE by overcharges; in that event the Indicated Refiners (intervenor-appellants herein) requested that the District Court conduct further proceedings permitting all interested parties to be heard on the issue of ultimate disposition of the overcharges, and ultimately to enter judgment for distribution to participants in the "Old Oil Entitlements Program" (R. 38960-1).

This was a request in detail for appropriate restitution proceedings, and intervention therein, which should have been granted or otherwise satisfied. Intervention by the Indicated Refiners was later granted after the decisions of March 25, 1983 but only for the purpose of appeal, as stated hereinafter. R. 31408.

The other of the "motions" (properly, applications) to intervene denied on March 25, 1983 in note 56 was the Petition for Limited Intervention of Luther Griffin and other independent retailers of gasoline (R. 38986-91). The petition (application) to intervene stated that DOE was not adequately representing the petitioners (applicants) and others. (In regard to the States, inadequate representation by DOE as defined by Rule 24(a)(2) was found later by the District Court. R. 38990.) The petition (application) was limited to restitutionary proceedings. R. 38990-1.

By orders of the District Court, entered before March 25, 1983, consideration of these two applications ("motion" and "petition") was stayed. R. 38985, 39006. Without vacating the stay orders and without hearing, these two "motions" (applications) were denied in note 56 of the Memorandum Opinion of March 25, 1983. 561 F.Supp. at 853. At the least, each should have been considered for granting before denial.

2. Orders Allowing Intervention Before Judgment of June 7, 1983.

On April 11, 1983, the District Court granted the "Conditional Motion" of the Indicated Refiners, previously denied and ordered that the refiner Champlin Petroleum Company, five other refiners and the American Refiners Association "may intervene in this action solely for purposes of appeal on the remedy issue." R. 31408.

On April 29, 1983, by "Memorandum" (R. 31607-12) and "Order" (R. 31613-4), the District Court granted

limited intervention to two groups of several named parties in each group, described as "A. Industry Intervenors" and "B. States." The Industry Intervenors were permitted to intervene "solely for the purpose of appeal on the issue of the proper remedy. . . ." The States were permitted to intervene "only for the purpose of appeal on the issue of the proper remedy" and of submitting limited comments on the "parties' proposed judgment." R. 31614. The "parties" referred to were United States and Exxon. R. 31607.

On May 5, 1983, Consumers Power Company and three refiners were permitted to intervene solely for the purpose of appeal on the remedy issue; and the States of Minnesota, New Jersey and West Virginia were permitted to intervene for the same limited purpose of appeal and limited comment stated in the Memorandum and Order of April 29, 1983. R. 31616-31619.

3. Order Allowing Intervention on Date of Judgment, June 7, 1983.

By "Order" of June 7, 1983, the District Court granted leave to intervene to "several additional states, territories, and the District of Columbia (the 'States')" and reconsidered *sua sponte* its denial of the "petition" of January 29, 1983 of Luther Griffin, *et al.*, ("Retailers") for limited intervention and granted leave to the Retailers to intervene only on their own behalf. R. 31661-2. The intervention of both the States and Retailers was "limited consistent with the Order of this court of April 29, 1983. . . ." R. 31661-2.

4. Orders Allowing Intervention After Judgment of June 7, 1983.

On June 17, 1983, Philadelphia Electric Company (PECO) was granted leave to intervene in its own behalf only for the limited purpose of appeal on the issue

of proper remedy as described in the Order of April 29, 1983.

On July 6, 1983, the Air Transport Association of America was granted leave to intervene for the limited purpose of appeal on the issue of proper remedy. R. 31680.

On July 6, 1983, Geraldine H. Sweeney, RJG Cab, Inc., and National Freight, Inc., were granted leave to intervene for the limited purpose of appeal on the issue of proper remedy. R. 31681.

C.

Validity and Effect of the Limitations on Right of Intervention

By denying intervention to claimants of constitutional property rights to restitution for a hearing or any other purpose,[11] it is submitted that the District Court failed to perform its constitutional and equitable duties and procedural duties under Rule 24(a)(2) and to exercise its powers to accord Due Process and historic equitable rights to the claimants seeking to intervene and possibly other claimants to restitution. See Parts I and II above and discussion in *Donaldson v. United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971).

This limitation of intervention to purposes of appeal was also contrary to Rule 24(a) which, in the absence of exceptional circumstances, permits only "housekeeping" limitations or limitations for efficiency on intervention of right under Rule 24(a)(2) F.R.Civ.P.[12]

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[11] The denial of intervention and hearing was before rendition of the Memorandum Opinion of March 25, 1983 and judgment of June 7, 1983, on grounds that "Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculations of the precise damages suffered by each." 561 F.Supp. at 853.

[12] The District Court expressly and properly found Rule 24(a)(2) to be applicable and satisfied in all particulars in

Timely intervention of right in the District Court under Rule 24(a)(2) should not have been limited to the purpose of appeal. Limitation of intervention under Rule 24(a)(2) is not authorized in absence of special circumstances not present in these cases. 7A Wright and Miller, *Federal Practice and Procedure*, § 1922, 623 at 625 and cases therein cited, where it is stated:

> "Thus, however desirable it may be that the courts have the power to impose reasonable conditions on the intervention of right, the fact that the Committee Note says that they have the power does not create the power if it does not otherwise exist. Nevertheless several courts have shown a willingness to accept the Note at face value and to allow the imposition of conditions on an intervenor of right. So long as these conditions are reasonable and are of a housekeeping nature, this view is likely to prevail. It seems very doubtful, however, that a court has the right to make significant inroads on the standing of an intervenor of right; and in particular, it should not be allowed to limit him in the assertion of counter-claims and other new claims." 7A Wright and Miller, *supra*, at 625-26. (Footnotes omitted.)

It is obvious that no limitation on constitutional procedural Due Process rights and historic equitable rights will be permitted, in intervention under Rule 24(a)(2).

The same conclusion is reached in 3B *Moore's Federal Practice* (Second Edition) ¶ 24.07, ¶ 24.09 and ¶ 24.16. In 3B *Moore's, supra*, ¶ 24.09, there is discussed the lack of discretion to place significant limitations on intervention of right under Rule 24(a) as opposed to permissive intervention under Rule 24(b) which may be limited in the exercise of a judicial discretion. In 3B *Moore's, supra*, ¶ 24.16[4] discussing *Status of the Intervenor*, the right to press a claim of right by raising questions

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granting intervention on April 29, 1983 before final judgment. R. 31609.

on the merits for protection of the intervenor is stated. So no limitations on constitutional and historic equitable rights to be heard are permitted.

D.

Proper Allowance of Intervention Under Rule 24(a)(2) by the District Court

In its approach to decision on these applications for intervention, the District Court properly found a right to intervene under Rule 24(a)(2), stating:

> "In this case, the industry applicants—refiners, wholesalers, and retailers—all allege that they, not the ultimate consumers of petroleum products, bore the burden of Exxon's overcharges and are entitled to restitution. For purposes of deciding whether to allow intervention the court must accept a party's well-pleaded allegations as true, and cannot look behind those allegations to reach the merits of the applicant's claims as a basis for denying intervention. *United States v. AT&T*, *supra*, 642 F.2d at 1291. The industry applicants have properly pleaded an interest in the overcharges by Exxon, and so have satisfied the 'interest' test. The States, for their part, obviously have a strong interest in defending before this court and on appeal this court's decision that they, on behalf of their citizens, are to receive restitution of the overcharges." R. 31609-10.

In the "Memorandum" on intervention of April 29, 1983 containing findings of fact and conclusions of law, the District Court concluded that it had the power to limit the scope of intervention to the purpose of appeal on the remedy issue, citing *U.S. v. American Telephone and Telegraph Company*, (C.A.D.C. 1980) 642 F.2d 1285, and *Smuck v. Hobson*, (C.A.D.C. 1969) 408 F.2d 175. R. 31611. In each of those cases there was a failure of any formal party to appeal, a circumstance not present in these appeals. Therefore, for that reason and

probably other reasons those two cases do not support the limitations on intervention to purposes of appeal in these cases. It is not desirable to extend this opinion by further discussion of the exceptional circumstances in those interesting cases, not present in these cases.

E.

1. Claims of Intervenor-Appellant Public Utility Philadelphia Electric Company (PECO), Consumers Power Company and Other Public Utilities.

Despite the fact that no notice and opportunity to file and prove claims for restitution were given to public utilities, Intervenor-Appellant Philadelphia Electric Company (PECO), an investor owned public utility, claiming to be damaged by the illegal overcharges of Exxon sought leave to intervene in its own behalf, and sought certification as representative of a class of investor owned utilities supplying electricity and gas to consumers. As stated in Part III B. 4. above, after the decisive Memorandum Opinion and judgment of the District Court, this application to intervene was granted for the limited purpose of appeal on the issue of remedy only. R. 31681. The effect of this action of the District Court was to deny PECO the right to intervene for purposes of filing and presenting any claim for restitution of damages.[13] (No comment will be made on the request for class certification because of the absence of a ruling by the District Court on the record and a fuller record.)

PECO and those joining in its brief on appeal, among other things, claim that the District Court erred in concluding without a hearing that all the overcharges were

[13] PECO, claiming to be an end user, has filed Joint Briefs with Geraldine H. Sweeney (Sweeney), RJG Cab Inc. (RJG) and National Freight Inc. (National Freight) alleged to be gasoline and diesel fuel consumers and end users in commercial and non-commercial motor vehicles.

passed through to the ultimate consumers as a result of the pervasive system of price controls. They contend that the system of price controls (10 C.F.R. Part 212) did not require passing through of increased costs but merely permitted it.

In regard to PECO it is reasonable to believe that PECO as a public utility supplying electricity and gas to consumers may have included the illegal overcharges in its rate base; and that as a public utility PECO would have standing to present a claim for restitution on behalf of its ratepayers to the extent that the overcharges were passed on. This dissent asserts that to summarily deny a claim for restitution under these circumstances is error. This conclusion is clear under the decisions of the Supreme Court of the United States, cited above, including *Morgan II, supra,* 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211 (1939), and *Interstate Natural Gas, supra,* 336 U.S. 577, 69 S.Ct. 775, 93 L.Ed. 895 (1949). Decisions of this Court, and of the Circuit Courts of Appeals, on the duty and power to order restitution clearly support this conclusion.

Further, PECO and others claim that market forces may have prevented the passing through of the illegal overcharges. This is a possibility that may be a fact.

To the extent that PECO did not pass on the overcharges it may have a claim to restitution in its own behalf. In a related case we judicially noticed on the remedy issue that the DOE on reference by the District Court of Kansas filed an Interim Report of the Office of Hearings and Appeals (OHA) on the issue of the impact of illegal overcharges which reported that overcharges on natural gas may have been passed through to customers and that any refund may be passed through to customers. This Interim Report is quoted *verbatim* in part in *Department of Energy v. Hunt,* (TECA 1984) 734 F.2d 816 at 824-825. The memorandum and order of the Dis-

trict Court of Kansas retaining ultimate jurisdiction and referring the task of finding the facts concerning "the impact of the overcharges" to the OH . is reported in *In re: The Department of Energy Stripper Well Exemption Litigation (Stripper Well)*, (D.Kan. 1983) 578 F. Supp. 586. It is judicially noticed that the presumably final *Report of the Office of Hearings and Appeals of the Department of Energy, (Report)* was filed in the District Court of Kansas shortly after June 19, 1985, the date of the signature thereon of the Director of the Office of Hearings and Appeals of the DOE. It is a conservative appraisal of this Report to find that at least some of the damages from the illegal overcharges for stripper well crude oil can be proven in approximate amounts, and in regard to public utilities in some instances in amounts passed on to its rate payers.

Most of what has been determined concerning PECO may apply to Consumers Power Company, whose application to intervene and the action thereon is described in Part III B. 2. above.

2. Claims of the Appellant-Intervenors Users of Gasoline and Diesel Fuel in Motor Vehicles.

As noted in footnote 13 in the section immediately above, Sweeney and other consumers and end users of gasoline and diesel fuel in commercial and non-commercial vehicles asserted in the District Court and in this Court on appeal claims for restitution of damages caused by the illegal overcharges of Exxon. Like PECO they were summarily denied the opportunity to file and present these claims in the District Court. This action was contrary to the controlling decisions on restitution of the Supreme Court of the United States, and of this Court, reviewed in detail above. The District Court had the constitutional and equitable duty and authority to provide a suitable notice and hearing of these claims, among others, and to award any proven damages.

At least, to the extent that evidence shows that the overcharges were not passed on to others, damages may be claimed.

3. Claims of the Indicated Refiners, Other Refiners, American Refiners Association, Independent Retailers, Industry Intervenors and States.

As noted above in Part III B. 1., a group of refiners, entitled Indicated Refiners, and other refiners sought to intervene in November 1982 before the decisive Memorandum Opinion of March 25, 1983 and the judgment of June 7, 1983. R. 38960-65.

This group requested that the District Court conduct further proceedings on disposition of the overcharges and the effect on victims including the effect of the "Old Oil Entitlements Program" which may have caused damages to those affected by illegal overcharges which resulted from misclassification of "old oil," thereby wrongfully relieving purchasers thereof of payments to the Entitlements Fund and adversely affecting amounts paid to beneficiaries of the Entitlements Fund.

The applications to intervene of the refiners, and the American Refiners Association, and the action thereon is described in Parts III B. 1. and III B. 2. hereinabove.

The rulings and discussions hereinabove covering the Indicated Refiners apply to the claims of the other refiners, including intervenor-appellants Gladieux Refinery, Inc., U.S. Oil and Refining Company, Marathon Petroleum Company, Mobil Oil Corporation and Murphy Oil Corporation, and possibly to the American Refiners Association, if it has standing to claim damages in any respect.

The applications to intervene of independent retailers of gasoline including Luther Griffin and the action thereon is described in Parts III B. 1. and III B. 3. above. These

independent retailers were entitled to participate as claimants in restitution proceedings. It was error to limit their intervention solely to purposes of appeal on the remedy issue.

The applications to intervene of the States, including the District of Columbia, the "Industry Intervenors" and the actions thereon are described in Parts III B. 1., III B. 2. and III B. 3. hereinabove. The limitations on intervention by these applicants to purposes of appeal on the issue of remedy was unauthorized.

Intervenor-Appellant Tosco Corporation (Tosco) and others described as small and independent refiners were permitted to intervene solely for the purpose of appeal. Tosco and six others were interpled by Exxon as crude purchasers against whom interpleader and declaratory relief were sought. Tosco and the six other refiners were entitled to notice and hearing on their claims to restitution.

Further, reasonable notice and opportunity to intervene in restitution proceedings should have been given to qualified claimants, including those who did not file applications to intervene.

4. Claims of Air Transport Association of America and Members.

The post-judgment action on the application of the Air Transport Association of America (Air Transport) to intervene limiting the intervention to the purpose of appealing the issue of proper remedy is described in Part III B. 4. hereinabove. The Intervenor-Appellant Air Transport states that its action is taken on behalf of 29 airlines, listed in Appendix A of its brief in this Court, that are direct purchasers from Exxon and end user consumers of kerosene base aviation jet fuel (kerojet).

While Air Transport as an association may, or may not have standing to claim damages sustained by its

members, each of its members that was a direct purchaser and end user of jet fuel, the cost of which was increased by the overcharges, should have reasonable notice and an opportunity to present its claim to damages in restitution proceedings.

An airline which was an end user of the jet fuel may have passed on the illegal overcharges to its passengers, customers and others. But it cannot be assumed summarily that all damages were wholly passed on to the passengers and customers of any airline that claims the contrary. It is judicially noticed that an airline may at times be unprofitable and unable to pass on all its costs, and unable to make a normal profit.

F.

Conclusion on Right of Intervenors and Other Claimants to Restitution, Notice and Hearing

The (1) unconstitutional denial of procedural Due Process, to claimants to restitution, (2) the improper limitations on the right to intervene under Rule 24(a)(2) F.R.Civ.P., and (3) the rendition of a summary judgment without hearing and without an adequate factual basis, considered separately and jointly, it is submitted, were prejudicial errors in respect to all claimants to restitution. Before the District Court as a constitutional court of equity, proceeding in the exercise of its discretion, may order disposition of the funds remaining after satisfying all meritorious claims for restitution, the law requires as a minimum, notice and an opportunity for a hearing for all claimants to restitution.

G.

Failure to Consider Petition for Interpleader

In addition to failing to consider intervention requested before the decisive Memorandum Opinion of March 25, 1983 was entered, no action was expressly

taken by the District Court to grant or deny the Petition and Counterclaim for Interpleader and Declaratory Relief of Exxon, filed December 5, 1980 (R. 105-302), requesting that appellant Tosco and six other "Crude Purchasers," listed in Exhibit B thereto (R. 283), over 2,000 "Selling Owners" of crude oil from Hawkins Field, listed in Exhibit A thereto (R. 114-282), and the plaintiff United States be ordered to interplead their respective claims to the alleged *excessive purchase prices and refunds* (R. 111). On February 5, 1981 the District Court *sua sponte* by an "Order" chose to "defer consideration and resolution of the administrative problems" caused by the Petition and Counterclaim for Interpleader and Declaratory Relief (R. 864). In the same order the Court provided that the defendants named in the Petition and Counterclaim "answer or otherwise respond within 20 days from the date of service of notice by this court that such answers or other responses shall be filed." R. 865. There is no record that the notice was ever filed or served on the United States, the Selling Owners or Crude Purchasers. This opportunity to begin restitution proceedings through interpleader was preempted without notice and hearing by the judgment of June 7, 1983.

IV

IMPROPER SUMMARY JUDGMENT ON RESTITUTION

In addition to violation of the constitutional principles, and the equitable historic duty and power to order restitution after notice and hearing, this dissenting opinion concludes that the District Court improperly rendered a summary judgment on restitution in implementing, in its judgment of June 7, 1983, its conclusion that it was impossible to identify the victims of the overcharge and determine the precise amount of damages, quoted above from its Memorandum Opinion of March 25, 1983. No proof exists in the record to support this factual con-

clusion; nor is any supporting proof cited by the District Court. If this conclusion of the District Court in whole or in part is based on judicial notice, the judicial notice of the underlying facts was unauthorized without a hearing, Rule 201(e), F.R.E., and probably unauthorized in any event. 1 *Weinstein's Evidence* ¶ 201[03], from Davis, *A System of Judicial Notice Based on Fairness and Convenience*, Perspectives of Law, 69 at 93 (1964), as follows:

> "The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both)."

The power of the District Court to render this summary judgment on its own initiative, without hearing, was not authorized by the Federal Rules of Civil Procedure, or by Rule 56 in particular. The cases supporting this conclusion are too numerous to list and discuss, but the leading controlling cases of the Supreme Court of the United States are *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944); *Arenas v. United States*, 322 U.S. 419, 64 S.Ct. 1090, 88 L.Ed. 1363 (1944); *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 93 S.Ct. 2469, 37 L.Ed. 2d 207 (1973); *Elgin Joliet & Eastern Railway Company v. Burley*, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945), decision adhered to on rehearing, 327 U.S.

661, 66 S.Ct. 721, 90 L.Ed. 928 (1946); *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 82 St.Ct. 486, 7 L.Ed.2d 458 (1962); *White Motor Company v. United States*, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963); *Agosto v. Immigration and Naturalization Service*, 436 U.S. 748, 98 S.Ct. 2081, 56 L.E.d.2d 677 (1978). These cases are chosen in 6 *Moore's Federal Practice*, Second Edition, ¶ 56.15[1-00], as the leading cases from the Supreme Court that state that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue remains for trial. A very large number of cases in accord are collected in 6 *Moore's, supra*, ¶ 56:15. In 10A Wright, Miller and Kane, *Federal Practice and Procedure*, § 2725 at pages 95-112, the same rule is stated citing many cases in accord. Further, in § 2725, *supra*, at page 112, the rule is stated that normally the court should notify the interested parties before rendering summary judgment in order to allow briefing and argument. In this case neither the parties designated as interpleader defendants in the petition and counterclaim by Exxon nor the applicants for intervention before the District Court before June 7, 1983 were notified or given an opportunity to be heard.

It is assumed that a summary judgment on the issues of restitution, if otherwise appropriate, may be entered on the initiative of the District Court as in this case, and that a summary judgment on restitution issues may be rendered without being so entitled as in this case. But such a summary judgment may not be entered without notice and hearing in the circumstances of this case. The District Court did in fact, if not in name, issue an unauthorized summary judgment on restitution issues, made easier by the limitations on the scope of intervention, the times of intervention and the stay of the interpleader issues, all without hearing those claiming to be victims of the violations of law by Exxon.

No Discretionary Equitable Disposition of Damages to Unidentifiable Victims Should Be Made Before Attempting to Identify and Make Restitution to Actual Victims

As discussed above, the District Court concluded without notice and hearing that it was impossible to trace the damages caused by the illegal overcharges of Exxon to the parties that were harmed thereby. Therefore, the District Court chose as a remedy to use by analogy the procedures of the "Warner Amendment," P. L. 97-377, § 155, 96 Stat. 1919-1920 (1982). The Warner Amendment, 96 Stat. 1919, required overcharge refund payments be directed to the States (as defined) for use in one or more of five listed energy conservation programs when the victims of the overcharges could not be identified.

The District Court in its Memorandum Opinion of March 25, 1983, at 561 F.Supp. at 856-857 stated:

> "The court shall order Exxon to make restitution to the United States Treasury of the full amount of the Hawkins Field overcharges, together with interest from the date of overcharge, the monies to be deposited into an escrow account, held in trust by the Department of Energy, to be disbursed in accordance with the procedures set forth in Section 155 of Pub. L. No. 97-377, 96 Stat. 1830, 1919 (1982).
>
> "In formulating its order, the court in no way relies on Section 155 as an express statutory grant of authority to this court, but acts instead in the exercise of its broad equitable powers to order restitution.[59]

"[59] Accordingly, the escrow fund established pursuant to this court's order shall of course not be subject to the provisions of subsection (e)(1) of Section 155 which limit the monies the Secretary of Energy may disburse to $200 million—received in settlements, not pursuant to judicial order—and which require a finding that the funds

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to be disbursed 'are not likely to be required for satisfying claims of potential claimants . . .' and that 'the use [of funds] under this section would be consistent with the remedial order or consent order covering such funds.' Section 155 shall otherwise apply in its entirety under this court's order as the set of terms and conditions governing DOE's handling of the escrow account established to receive restitution payments from Exxon.

However, Section 155 clearly bespeaks the intent of Congress that violators of the petroleum price regulations should be made to disgorge their illgotten gains even in situations, like the case before the court, where the victims of the petroleum overcharges cannot be identified. The colossal scale of Exxon's wrongdoing, and the workings of pervasive regulations to spread the burden of that wrongdoing impossibly far and wide, must not deter this court from fashioning an appropriate equitable remedy. The purpose of the domestic petroleum price regulations was to keep oil prices down, to relieve consumers of some of the burden of towering oil costs. The five energy conservation programs identified in Section 155 operate across the nation to reduce that same burden, either by reducing overall consumption through conservation or by direct financial assistance to those most in need. Although one might speculate as to alternative remedies, this court respects the wisdom of the solution chosen by Congress and shall adopt it as the most appropriate equitable remedy in the circumstances of this case."

As quoted above, the District Court stated that P. L. 97-377, § 155 was not followed as an express statutory grant of authority. That lack of authority is very clear from § 155 and its legislative history, for the following reasons:

1. Under § 155, the funds to be distributed must be "likely not to be . . . refunded to injured persons because the purchasers of the refined petroleum products cannot be reasonably identified or paid or because the amount of

each purchaser's overcharge is too small to be capable of reasonable determination." Section 155 (a)(2), 96 Stat. 1919. The District Court did not make any attempt by any sort of equitable judicial restitution proceedings to refund the amounts overcharged by Exxon to injured parties. Therefore the District Court could not properly order all of Exxon's overcharges be restored through § 155, even if the Warner Amendment could be applied by analogy, a question this dissent asserts need not be decided on these appeals.

2. Section 155 limited the amounts to be disbursed to $200,000,000. Section 155 (e)(1), 96 Stat. 1919. Exxon's overcharges, with interest, which the District Court properly found subject to restitution, far exceed that amount, even if any prior funds distributed under § 155 are ignored.

3. The funds to be distributed in § 155 were to come from *settlements* of alleged petroleum pricing and allocation violations, rather than from adjudications of a Court as in this case.

4. According to the legislative history of § 155, the statute was to establish "a *one-time* distribution of $200,000,000 to states . . . ." House of Representatives Conference Report No. 97-980 at page 198 (emphasis added). Representative John D. Dingell emphasized these limits as follows:

> "The provision is a one-time provision. It should not be viewed as a precedent. It does not confer on DOE any new restitutional or remedial authority or imply that the DOE has such authority. It is a very limited provision aimed at helping people. It is, I stress, an exclusive, one-time disbursement authority." 128 Congressional Record H10435 (December 20, 1982).

The District Court seeks to avoid the above limits of § 155 by relying on its "broad equitable powers" but its

equitable powers cannot bypass but must recognize the legal rights to restitution that exist in parties harmed by Exxon's overcharges. Section 155 provided for the rights of potential claimants by expressly requiring funds to be used which "are not likely to be required for satisfying claims . . . ." Section 155 (e) (1) (A), 96 Stat. 1919. In the discussion of the "Warner Amendment," Senator J. Johnston, Jr., made the following statements:

> "What we have involved here is a fund collected from those who overcharged but where the consumers cannot be identified, and that is the fund involved, and no other money.
>
> "If it were involved with those who could be identified then indeed they should receive the money and *they would have a vested right to receive that money.*
>
> "That money is not involved here but rather money from consumers who cannot be identified." 128 Congressional Record S15126 (December 16, 1982) (emphasis added).

The fact that Congress chose to distribute a certain amount of money through § 155 should not be decisively significant in the exercise of a court's equitable power to make restitution for the following reasons:

1. Congress showed no intention of making more than one distribution under § 155, although it could have done so.

2. Congress limited the amount to be distributed to $200,000,000 although it could have chosen a higher amount.

3. Portions of the legislative history indicate that an important motivation for the introduction of what became § 155 was the desire to ease the burden on the poor of rapidly increasing energy prices. Senator John W. Warner stated:

"I am convinced that this amendment is the best way to get these funds into the hands of Americans suffering from rapidly escalating energy prices during this frigid winter season." 128 Congressional Record S15116 (December 16, 1982).

V

ENTITLEMENTS PROGRAM, RESTITUTION ISSUES AND DOE ACTIONS

The old oil Entitlements Program was fully operative during the control of prices and allocation of crude oil under the EPAA and the EPCA, and the Entitlements Program necessarily affected the issues to be resolved in restitution proceedings in the District Court for reasons which follow.[14] The Entitlements Program was estab-

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[14] See the Application for Limited Intervention filed April 29, 1983 (R. Index) in the District Court by the Intervenor-Appellants Gladieux Refinery, Inc. (Gladieux) and U.S. Oil and Refining Company (U.S. Oil) as members of the "Consumers Power Group" in which they stated, among other things, the following:

"1. Each member of the Consumers Power Group was a participant in the Old Oil Entitlements Program prior to the decontrol of crude oil in January 1981.

"2. This Court, in its Memorandum Opinion of March 25, 1983, found defendant, Exxon, liable for price overcharges (including interest) resulting from miscertification of crude oil at its Hawkins Field Unit, in an amount close to $1.5 billion.

"3. If a final determination with respect to this overcharge had been made prior to January 27, 1981, this substantial amount would automatically have been paid to all participants in the Entitlements Program. Those regulations no longer expressly require participants in the Entitlements Program to recertify their reported crude oil receipts to correct for overcharges. Consequently, no automatic mechanism for restitution of these overcharges to Entitlements Program participants now exists.

[Continued]

lished by regulation of the predecessor of the DOE which prescribed its operation, including obligations and benefits. 10 C.F.R. § 211.67 (1974). The Entitlements Program was continued until decontrol on January 28, 1981, by regulation 10 C.F.R. § 211.67, as amended from time to time.

A good brief description of the Entitlements Program, and its purposes, by Judge Estes of this Court, is found in the opinion in *Pasco, Inc. v. Federal Energy Administration* (*Pasco*), (TECA 1975) 525 F.2d 1391, as follows:

> "To minimize the inflationary impact of world-wide oil prices and at the same time to provide an incentive for increased domestic production of crude oil, the 'two-tier' pricing system for crude oil was promulgated. The 'two-tier' pricing system basically imposes a ceiling price of approximately $5.25 per barrel on all 'old' oil and allows new and released oil to be sold without respect to the ceiling price, i.e., at approximately $11.28 per barrel. The FEA found, however, that while the 'two-tier' system met certain necessary objectives, the great disparity between the price of controlled and uncontrolled crude oil was having an unequal impact on all refiners. During the base period of May, 1973, composite crude oil costs of all refiners were approximately equal; however, with the pricing system in effect, the major

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[14] [Continued]

"4. No party is before this Court to represent the interests of Entitlements Program recipients during the relevant period.

"5. The Consumers Power Group are, therefore, entitled to intervene in this action as a matter of right, pursuant to Rule 24(a) of the Federal Rules of Civil Procedure. In the alternative, this Court should grant the Consumers Power Group permission to intervene pursuant to Rule 24(b)." (R. 38468-9, duplicated at R. 38471-2.)

integrated oil companies, who as a class had far greater access to old oil, had significantly lower composite crude oil costs in refining their products than did the small and independent refiners.

"To insure that all refiners and marketers shared equally in the benefits of price-controlled crude oil and the burdens of uncontrolled crude oil, the FEA adopted the Entitlements program. Under this program, a refiner must have one 'entitlement' for each barrel of old oil it refines during a particular month. All refiners are initially issued for each month an amount of entitlements equal to their proportionate share of the old oil refined during the month on a nation-wide basis. Thus, a refiner running more old oil as a percentage of its total refinery runs than the national average would have to buy additional entitlements from a refiner which ran a smaller percentage of old oil during the month than the national average. The national ratio of old oil runs to total refinery runs is lowered somewhat by the issuance of additional entitlements to small refiners under the 'small refiner bias' built into the regulation and to certain eligible firms which import residual fuel oil and home heating oil. By requiring refiners and importers who sell entitlements to reduce their crude oil or product costs by the amount of the entitlement sales proceeds, and allowing a purchaser of entitlements to include the cost of entitlements in its crude oil costs, the FEA basically equalized the average weighted crude oil costs of all refiners, thereby eliminating the inequities caused by the 'two-tier' pricing system." (Footnotes omitted.) *Pasco, supra*, 525 F.2d at 1394-1395.

After decontrol, as before decontrol, the DOE has been legally obliged to calculate and collect the obligations, and pay the benefits of the Entitlements Program accrued during control.[15] The decontrol by the Executive in Jan-

[15] For example, in *Ashland Oil, Inc. v. DOE (Ashland)*, (TECA 1985) 760 F.2d 298, this Court affirmed the dismissal

uary 1981 under the provisions of the EPCA in 1975 seemed to contemplate that the DOE, as successor to the FEA, would continue its quasi-judicial actions to proceed, as before decontrol, to order refunds (make restitution) of illegal overcharges such as by Subpart V (10 C.F.R. §§ 205.280 through 205.288) and adjustments in the Entitlements Program, to those damaged by the overcharges. For this purpose, there was enacted in 1975 § 6401 of Title 42 U.S.C., (§ 531 of Pub.L. 94-163, Title V) which provides as follows:

> "§ 6401. Expiration of authority
>
> "Except as otherwise provided in subchapter I or subchapter II of this chapter, all authority under any provision of subchapter I or subchapter II of this chapter and any rule, regulation, or order issued pursuant to such authority, shall expire at midnight, June 30, 1985, but such expiration shall not affect any action or pending proceedings, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to midnight, June 30, 1985."

The current status of administrative proceedings and actions by DOE to determine these obligations and benefits are not clear and should be determined by the District Court on notice and hearing. It is known that the DOE began to perform its obligations after decontrol by prescribing in detail the manner and timing of final adjustment of the Entitlements Program in 10 C.F.R.

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of Ashland's suit under ESA §§ 209 and 210 to overturn or modify a settlement between DOE and Cotton Petroleum Company. This Court stated that:

> "There has been no factual inquiry as to who was injured by Cotton's overcharges. Instead, one of the purposes of the pending Subpart V proceeding is to make precisely that determination." *Ashland, supra,* 760 F.2d at 301.

In the Subpart V proceedings the Office of Hearings and Appeals "explicitly proposed to permit such refiners [as Ashland] to submit claims in the refund procedure and demonstrate their injury." *Ashland, supra,* 760 F.2d at 300.

§ 211.69 designated as "Entitlements Adjustment Mechanism," adopted July 13, 1981 and amended thereafter. The purpose of this § 211.69 was stated in paragraph (b) thereof to be "a method for an orderly termination of the domestic crude oil entitlements program established in § 211.67." The probability that claims would be allowed in administrative or judicial proceedings was recognized in the definition of "claim" in paragraph (c) of § 211.69 as follows:

> " 'Claim' means the dollar amount determined by ERA to be owed to a firm resulting from adjustments, amendments or other modifications to any one or more Entitlements Notices issued by ERA pursuant to § 211.67 for the period from October 1, 1980, through January 27, 1981, *or resulting from an administrative or judicial determination.*" (Emphasis added.)

The effect on the obligations of Exxon to the DOE as administrator of the Entitlements Program, and to the potential or certified beneficiaries of the Entitlements Program was not determined by the District Court. It is possible that claimants under the Entitlements Program in addition to the applicants for intervention in the District Court might appear if given the opportunity and might prove their claims to restitution. It is established that applicants for intervention Gladieux and U.S. Oil sought the right to do so for themselves and others.

The performance by DOE of its obligations to administer the lawful orderly termination of the Entitlements Program could not be judicially assumed without a hearing of interested parties, and might be disproved. See *Navajo Refining Company v. United States Department of Energy*, (TECA 1984) 750 F.2d 966.

After the final judgment of the District Court on June 7, 1983, the DOE made some formal "final" and tentative decisions in 1984 and 1985 concerning the Entitlements Program. Nevertheless because these actions of the DOE are relevant to future judicial restitution pro-

ceedings, and may be judicially noticed by this Court, it is noted that the DOE on June 28, 1984, through the Economic Regulatory Administration (ERA) issued a "Notice of final decision; notice of public proceeding and public hearing" entitled "January 1981 and Entitlements Adjustment Notices." This document was published in 49 Federal Register (F.R.), Number 129 of July 3, 1984 at pages 27410-27420. The final decision was the decision not to issue the January 1981 and Final Entitlements Adjustment Lists. 49 F.R. *supra* at 27413. The tentative decision dealt with "Outstanding Exception Orders." 49 F.R. *supra* at 27418-27420. In this document described above, the final decision was supported by a relatively long recitation of history, administrative determinations of fact, notice of discretionary action and related matters concerning the subject matter. 49 F.R. *supra* at 27410-27418. No determination of the validity of any part thereof is in order since the document was not before the District Court.

Also, on January 9, 1985 the ERA, for DOE, filed a "Final Decision" published in 50 Federal Register, No. 9, 1919-1925 of January 14, 1985, summarized therein as follows:

> "The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) is announcing the final decision concerning the Department's policy on Entitlements exception orders. If the Office of Hearings and Appeals (OHA) determines that refiners as a class were injured by overcharge activity, OHA will fund receive orders from that portion of refund money which corresponds to the injury sustained by refiners as a class. Dispense orders will not be effectuated." 50 F.R. at 1919.

The validity of any part of these, or any other administrative actions that may exist, is not discussed except to note that any material part of such document that is invalid under the Administrative Procedure Act (APA) or other statute, the United States Constitution, or historic equitable principles is ineffective.

It seems clear that the miscertification of crude oil as upper tier oil during control, and collection of wrongfully charged prices may have had some effect on the rights of others under the Entitlements Program, and that the resulting damages of the victims of overcharges might be satisfactorily shown in fact and amount. At least the contrary should not be assumed on judicial notice without notice and hearing, for reasons stated above.

VI

STATUTORY DUTIES AND POWERS OF THE COMPTROLLER GENERAL

The Comptroller General of the United States is and was obligated and empowered to monitor the operations of the DOE (and its predecessors) by Title 42 U.S.C. Section 7137 which provides as follows:

> "The functions of the Comptroller General of the United States under Section 12 of the Federal Energy Administration Act of 1974 [15 USCS § 771] shall apply with respect to the monitoring and evaluation of all functions and activities of the Department under this Act [Department of Energy Organization Act, P.L. 95-91] or any other Act administered by the Department. (Aug. 4, 1977, P. L. 95-91, Title II, § 207, 91 Stat. 574.)"

Title 15 U.S.C. Section 771 referred to in the paragraph quoted immediately above states in part the following:

> "(a) Scope of activities; monitoring activity; data to Comptroller General from Administration; reports and recommendations to Congress. For the duration of this Act, the Comptroller General of the United States shall monitor and evaluate the operations of the Administration including its reporting activities. The Comptroller General shall (1) conduct studies of existing statutes and regulations governing the Administration's programs; (2) review the policies and practices of the Administration; (3) review and

evaluate the procedures followed by the Administrator in gathering, analyzing, and interpreting energy statistics, data, and information related to the management and conservation of energy, including but not limited to data related to energy costs, supply, demand, industry structure, and environmental impacts; and (4) evaluate particular projects or programs. The Comptroller General shall have access to such data within the possession or control of the Administration from any public or private source whatever, notwithstanding the provisions of any other law, as are necessary to carry out his responsibilities under this Act and shall report to the Congress at such times as he deems appropriate with respect to the Administration's programs, including his recommendations for modifications in existing laws, regulations, procedures, and practices."

Critical Opinions of the Comptroller General Since Decontrol on Duty to Attempt to Order Restitution of Illegal Overcharges

In the performance of these statutory duties and powers the Comptroller General has repeatedly and formally advised DOE that it has exceeded its statutory power to collect and to dispose of funds collected in consent order settlement of monetary claims for alleged violations of petroleum price and allocation regulations by depositing funds in the Treasury, or otherwise disposing of them, without prior efforts to make restitution to victims of the overcharges. The first instance of judicial notice by this Court of the actions of the Comptroller General in so advising DOE was made in *Department of Energy v. Hunt*, (TECA 1984) 734 F.2d 816 at 824.

The Comptroller General has recently made a comprehensive report to the House of Representatives of the United States through the Subcommittee on Oversight and Investigations and the Committee on Energy and Commerce which in part, in Chapter 3 on the subject of restitution of illegal overcharges, states:

"CHAPTER 3

DOE NEEDS TO ENSURE THAT OIL OVERCHARGE DISTRIBUTIONS RESULT IN RESTITUTION TO INJURED PARTIES

"When parties injured by oil companies' overcharges are not readily identifiable, ERA is required by DOE's regulations to refer these cases to OHA, which is responsible for allowing potentially harmed parties to file a claim for a refund. If funds remain after all eligible claims are made, OHA can make payments to states. ERA, however, has bypassed OHA and has issued four consent orders that provide for oil companies to make direct payments to states without prior efforts to identify those overcharged and the amount of the overcharges. ERA did refer six other cases to OHA as required by DOE's regulations.

"In these consent orders, ERA has agreed to several types of distributions as settlement of the oil companies' alleged violations. Some of the orders have involved payments to institutions, such as state governments, that were not actually injured by the overcharges. The decision by the Comptroller General of the United States (62 Comp. Gen. 379 (1983)) concluded that ERA was in these cases improperly using the consent orders by making, or allowing the oil companies to make, distribution of overcharge refunds without prior efforts to identify those overcharged and the amount of the overcharges.

"DOE maintains that its regulations are not mandatory and that it has the authority to take such actions. As discussed in this chapter, we disagree and believe that DOE should follow its mandatory regulations and assure that the injured parties receive the benefit of the oil overcharge distributions.

"The following illustration shows, as of July 18, 1984, the four ERA consent orders and six OHA decisions and orders which resulted in payments to states. (The illustration in appendix II shows the payments that the eight states had received as of

July 18, 1984, as a result of these orders and decisions. As discussed on page 6, we did not review the Virgin Islands' use of funds received as a result of individual oil company consent orders.)

"Illustration 3

ERA Consent Orders and OHA Decisions and Orders Which Resulted in Payments to States as of July 18, 1984 [a]

"Company distributions ordered by ERA	Authorized uses of the funds	Amount [b]
Chevron	—Highways and bridge maintenance and repair —Ridesharing (i.e. vanpool and carpool) programs —Public transportation projects —Residential or commercial building energy audits —Grant or loan programs for weatherization or other energy conservation equipment installation —Energy assistance programs —Airport maintenance or improvement —Reduction in airport user fees —Energy conservation or energy research offices and administration	$25,000,000
Standard Oil Company (Ohio)	Although DOE encouraged the states to use the funds for energy-related projects, DOE intended to provide maximum flexibility to the states in determining appropriate uses of the funds	10,000,000
Imperial Refineries Corporation	—Same as Sohio	600,000

Site Oil Company of Missouri and Flash Oil Corporation (Site and Flash)	—Energy-related purposes	450,000
Total ERA-approved distributions		$36,050,000

"Distributions ordered by OHA	Authorized uses of the funds	Amount [b]
Palo Pinto Oil and Gas	—Energy-related plans	266,904
PVM Oil Associates, Inc.	—Projects to benefit heating-oil customers in New York City	67,961
Worldwide Energy Corporation	—Projects to benefit natural gas liquids users in Oklahoma and Texas	49,400
Armstrong and Associates	—Projects to benefit parties injured by overcharges (Tex.)	9,863
Standard Oil Company (Indiana)	—Projects to benefit class of persons injured by the overcharges—consumers of motor gasoline and middle distillates	24,000,000
Belridge Oil Company	—Projects to benefit those citizens most likely affected by overcharges	95,821
Total OHA-ordered distributions		24,489,949
Total		$60,539,949

"[a] Does not include payments to any state which, as a customer of the oil companies whose alleged violations were settled by terms of a consent order, qualified for a refund as a purchaser of petroleum products.

"[b] Amounts shown are the payments to the states specified in ERA's consent orders and OHA's decisions and orders and do not include any interest which DOE may have required the companies to pay.

"ERA-ORDERED DISTRIBUTIONS MAY NOT RESULT IN RESTITUTION TO INJURED PARTIES

"The first four companies listed in the illustration are those which ERA ordered to make payments totaling $36 million to the states to settle alleged overcharges. The requirement for those payments was contained in the consent orders ERA and the companies signed in settling the companies' alleged overcharges. We believe that ERA has improperly used these consent orders because the payments were made without giving overcharged customers an opportunity to present their claims through DOE's established procedures. Also, the authorized uses of the funds were so general that there was little assurance that the funds would be used for restitutionary purposes.

"DOE's regulations (10 C.F.R. Part 205, Subpart V), promulgated pursuant to the Emergency Petroleum Allocation Act of 1973, establish procedures for distributing oil overcharge refunds when those overcharged and the amounts of the overcharges cannot be readily identified. These procedures are designed to protect the rights of overcharged consumers and require ERA to refer overcharge cases to OHA when ERA cannot readily identify the parties injured by the oil companies' overcharges. OHA then is responsible for obtaining public comments on its proposed method of making refunds and allowing potentially injured parties to file a claim for a refund. These procedures were followed for the last six companies listed in the illustration.

"ERA bypassed these procedures for the first four companies listed in the illustration. The consent orders for those companies did not present potentially injured parties an opportunity to file claims. Rather, payments went directly to the states without prior efforts to identify those overcharged and the amounts of overcharges.

"We have previously brought this matter to DOE's attention in two opinions and two decisions of the Comptroller General of the United States.[1] (Footnote 1, Comptroller General of the United States Opinions B-200170 Apr. 1, 1981, and 60 Comp. Gen. 15 (1980); and Decisions 62 Comp. Gen. 379 (1983) and 63 Comp. Gen. 189 (1984).) In these two documents, we said that DOE is legally bound to follow its own regulations, which require that the administrative procedures discussed above be followed in determining appropriate restitutionary distribution mechanisms. Consequently, we have concluded that DOE does not have the authority to avoid its subpart V regulations by agreeing to consent order provisions that distribute funds directly, without prior efforts to locate injured parties.

"DOE has maintained that it has the authority under the Emergency Petroleum Allocation Act of 1973 to take any action necessary to eliminate or compensate for the effects of a violation of its petroleum pricing and allocation regulations. In its May 25, 1984, *Federal Register* ruling, DOE said that it is not required by its regulations or statute to use the administrative procedures. Rather, DOE asserts that it has the authority to employ various forms of indirect restitution, including refunds to the miscellaneous receipts of the U.S. Treasury and payments to state governments.

"Based on our research of the applicable court decisions,[2] (Footnote 2, See 62 Comp. Gen. 379, 382-383, 386-387 (1983).) We believe DOE's authority is limited to making refunds to overcharged customers and to those likely to have been injured by the overcharges. We also believe that DOE has not been expressly granted any authority to promote the interests of consumers in general through direct payments to them or through grants made on their behalf to states or other entities. Therefore, we believe DOE did not have the authority to agree to consent order provisions such as the four discussed above.

"In addition to not following the subpart V procedures for these four cases, ERA has agreed to settlement terms which may not provide for restitution to injured parties. As shown in the illustration on page 22, the states can use these four settlement distributions for purposes such as highway and bridge maintenance and repair, airport maintenance or improvement, energy conservation or energy research offices and administration, and energy-related projects. Based on our review of these four consent orders and the *Federal Register* notices announcing them, we did not find any provisions therein which would enable ERA to ensure that these refunds would result in direct restitution to injured parties.

"Even though a state may be complying with the provisions of the consent order, it might not be using the funds for restitutionary purposes. For example, Pennsylvania funded basic and applied research on energy use, New York funded its state energy office, and Georgia funded airport improvement projects. Texas, which as of July 18, 1984, had received $798,858 as a result of four consent orders (Chevron, Standard Oil (Ohio), Site and Flash, and Armstrong and Associates [3]) (Footnote 3, The Armstrong and Associates consent order accounted for only $14,232 ($9,863 refund plus $4,369 of interest) of the $798,858 and was the only one of these four which OHA handled, under DOE's subpart V procedures. As discussed in the next section, OHA usually approves states plans before disbursing the refunds. Because the Armstrong and Associates case involved only a small amount of funds, OHA did not require such approval in this case.) appropriated these funds to its Bureau of Economic Geology, University of Texas at Austin. The Deputy Director of the Bureau told us that they plan to use the funds for the following two research projects:

—identifying, classifying, and researching methods to enhance the recovery potential of existing Texas oil reservoirs and

—identifying and classifying Texas' lignite deposits and researching the economic recovery factors which would make exploration feasible.

"In our opinion, these two projects would directly benefit energy producers. Energy consumers would only indirectly benefit, and then only if the research resulted in the production of sufficient additional oil and/or lignite to help stabilize consumer prices of products produced from these resources.

"OHA'S PROCEDURES FOR ENSURING THAT STATES PROPERLY USE OIL OVERCHARGE DISTRIBUTIONS

"Although OHA ensures that states properly use the distributions which it orders, prior to March 1984 it had not ensured that the states were using the interest earned on these distributions in accordance with OHA-approved state plans. After we brought this matter to OHA's attention in March 1984, it began to require the states to use such interest in accordance with state plans.

"For five of the six OHA-ordered distributions, OHA required the states to have their planned uses of the funds approved by OHA before the states received the funds. Also, for these five cases the states are required to submit a follow-on report to OHA on how they have used the funds.

"For the sixth case, Armstrong and Associates, OHA did not require either an approved plan or a follow-on report. OHA decided that in view of the small amount of funds ($9,863), it would not be cost effective to require the state to channel these funds to specific segments of the population who were most affected by the overcharges. Rather, OHA decided to deposit the $9,863 in Texas' escrow account established to hold such funds pending the state leglislature's approval of how the funds would be used.

"We discussed this case with an OHA official, particularly because, in the Worldwide Energy Corpora-

tion case ($49,400 in May 1983), OHA required a plan and follow-on report from Oklahoma even though its share was only $8,828. The OHA official said that Armstrong and Associates was the first of these distributions (Jan. 1983) to the states. Since that time, OHA has been requiring a plan and follow-on report irrespective of the amount of the refund.

"Although OHA monitored five of the six refunds to the states, prior to March 1984 it did not monitor the states' use of the interest earned after they received these refunds. Of the eight states we visited, four (California, Georgia, Pennsylvania, and Texas) were using the interest they had earned on both the ERA-ordered and OHA-ordered distributions for general purposes, rather than for the same purposes as the refunds themselves. Arizona and New York were appropriately using their earned interest for the same purposes as their refunds. Florida officials had not yet decided how to use the interest and Louisiana officials could not provide adequate documentation on how they have used or will use their interest.

"After our discussion with an OHA official in March 1984, OHA began requiring states to use the interest earned on these refunds in accordance with the OHA-approved state plans. We agree with this requirement because we believe that the states' use of the interest earned as a result of these oil overcharge refunds should be monitored and controlled by DOE.

"CONCLUSIONS

"Under DOE's subpart V procedures, ERA is supposed to refer oil overcharge cases for which it is difficult to readily identify the injured parties to OHA for resolution. ERA, however, has not followed these procedures in all cases. As a result, the ERA-approved distributions of oil overcharge funds to the states may not have resulted in restitution to the

injured parties. Rather, ERA has approved distributions to the states without ensuring that the distributions are directly related to those who were injured by the overcharges. To provide adequate assurance that the injured parties receive the benefit of the oil overcharge refunds, we reiterate the Comptroller General of the United States' opinions and decisions that the Secretary of Energy comply with DOE's mandatory procedures to identify injured parties."

These recitations are factually supported by records too lengthy to quote, that are judicially noticed, listed in Addendum No. 1, hereof.

The opinions and decisions of the Comptroller General cited in footnotes 1 and 2 of the above quotation are judicially noticeable and should be considered as advisory in determining whether to rely on the DOE to assist in identifying those damaged by illegal overcharges and the amounts thereof. Those opinions and decisions, in part, rely on opinions of this Court on restitution.

Judicial notice has also been taken of the actions since decontrol in discontinuing the monthly publications of the Entitlements Program which served the purposes of restitution of damages resulting from illegal overcharges and implementing the restitutional purposes of exception determinations. See the complaint of *Navajo Oil Co. v. United States Department of Energy*, (TECA 1984) 750 F.2d 966.

Some of the records of the DOE concerning the Entitlements Program since decontrol are listed in Addendum No. 2 hereof.

If a district court finds that the DOE is unable or unwilling to assist in the process of identifying those damaged by the illegal overcharges found to have existed in this or other basic litigation, then other means including, if necessary, reference to a special master or special masters should be considered.

VII

POWER OF DISTRICT COURT TO TAX COSTS OF MAKING RESTITUTION

It is obvious that in restitution proceedings in equity the usual costs may be allowed by a district court to the prevailing party under Rule 54(d) F.R.Civ.P. against the party other than the United States, adjudged to have violated the statutes or regulations, or both. Because restitution proceedings may require additional costs and expenses in special circumstances a district court has the power to assess additional costs. *Brashear Freight, supra,* 312 U.S. 621 at 629, 61 S.Ct. 784 at 788, 85 L.Ed. 1883 at 1088 (1941); 10 Wright, Miller & Kane, *Federal Practice and Procedure* § 2668; 6 *Moore's Federal Practice,* Second Edition, ¶ 54.77[1] at 1702.

If a district court finds it necessary or desirable under the exceptional circumstances to appoint a special master to conduct proceedings on all or some of the issues in the restitution proceedings, subject to judicial order of the district court the appointment and taxation of the additional cost and expenses, including compensation of the master, is authorized by Rule 53 F.R.Civ.P. 10 Wright, Miller & Kane, *Federal Practice and Procedure* § 2670; 6 *Moore's Federal Practice,* Second Edition, ¶ 54.77[3].

CONCLUSIONS

For the foregoing reasons, the judgment of the District Court on the basic issues of the violations of the statutes and regulations, including misclassification of crude oil by Exxon and allowance of interest are properly affirmed. The detailed findings of fact and conclusions of law of the District Court on the basic issues supporting its judgment on the illegal overcharges and the amount thereof are sound and represent judicial performance of complex and difficult tasks in keeping with the best traditions of the judiciary of the United States.

The action of the District Court in ordering the entire amount of the overcharges and interest paid to the Treasury of the United States for disposition analogous to that provided in the Warner Amendment, § 155 of P. L. 97-377 should be reversed, and the issues of restitution of damages to those injured by the illegal overcharges should be remanded to the District Court for further proceedings in accordance with the controlling equitable, constitutional and statutory principles discussed herein.

Addendum No. 1

Summary of Some Principal Administrative Decisions, Opinions and Orders Relevant to Restitution of Excessive Charges Under EPAA and EPCA (1977 to Present)

I.

Relevant Published Decisions and Published and Unpublished Opinions of the Comptroller General (CG) on Powers and Duties of the Department of Energy (DOE) Concerning Restitution of Overcharges under the EPAA and EPCA.

A. Published Decision by Special Assistant to CG in 63 Comp. Gen. 189 (1984), cited in *Department of Energy v. Hunt*, (TECA 1984) 734 F.2d 816 at 824;

B. Unpublished opinion of General Counsel (CG) directed to Theodore J. Garrish, General Counsel, DOE, B-210176 (October 4, 1984).

C. Unpublished opinion by Special Assistant to CG directed to John Paul Hodel, Secretary of Energy, B-210176 (October 4, 1984).

D. Published decision by Special Assistant to CG in 62 Comp. Gen. 379 (1983).

E. Unpublished opinion No. B-200170 (April 1, 1981).

F. Published opinion of CG in 60 Comp. Gen. 15 (1980).

II.

Final Decisions, Rulings and Notices about Refund Procedures of DOE, Economic Regulatory Administration (ERA) or Office of Hearings and Appeals (OHA) (one or more of them) 1983-1985.

A. Recent Notices of Implementation of Special Refund Procedures (February 1985):

1. Notice of Implementation of Special Refund Procedures, 50 F.R. 6244 (February 14, 1985).

2. Notice of Implementation of Special Refund Procedures and Solicitation of Comments, 50 F.R. 6240 (February 14, 1985).

3. Notice of Implementation of Special Refund Procedures, 50 F.R. 5307 (February 7, 1985).

4. Notice of Implementation of Special Refund Procedures, 50 F.R. 5305 (February 7, 1985).

5. Notice of Implementation of Special Refund Procedures, 50 F.R. 4785 (February 1, 1985).

6. Notice of Implementation of Special Refund Procedures, 50 F.R. 4774 (February 1, 1985).

7. Notice of Implementation of Special Refund Procedures, 50 F.R. 4766 (February 1, 1985).

8. Notice of Implementation of Second Stage Refund Procedures, 50 F.R. 4763 (February 1, 1985).

9. Notice of Implementation of Special Refund Procedures, 50 F.R. 4757 (February 1, 1985).

10. Notice of Implementation of Special Refund Procedures, 50 F.R. 4749 (February 1, 1985).

11. Notice of Implementation of Special Refund Procedures and Solicitation of Comments, 50 F.R. 4739 (February 1, 1985).

B. Noteworthy Final Decisions, Rulings and Notices about Refund Procedures:

1. Final Decision, 50 F.R. 1919 (January 14, 1985).

2. Notice of Final Decision; Notice of Public Proceedings and Public Hearing, 49 F.R. 27410 (July 3, 1984).

3. Ruling, 49 F.R. 22063 (May 25, 1984).

4. Notice of Issuance of Proposed Decision and Order for the Implementation of Special Refund Procedures, 49 F.R. 6542 (February 22, 1984).

5. Notice of Implementation of Special Refund Procedures and Solicitation of Comments, 49 F.R. 3125 (January 25, 1984).

6. Notice of Implementation of Special Refund Procedures and Solicitation of Comments, 48 F.R. 57608 (December 30, 1983).

7. Notice of Action Taken on Consent Order, 48 F.R. 28536 (June 22, 1983).

III.

Delegation Orders to OHA or ERA to Take Action or to Establish Policy of DOE, Issued by DOE.

A. Delegation Order No. 0204-4 (1977), quoted at 10 C.F.R. Part 1001, Appendix (1984).

B. Delegation Order No. 0204-24 (March 30, 1978).

C. Delegation Order No. 0204-24, Amendment No. 1 (May 5, 1980).

D. Delegation Order No. 0204-114 (December 20, 1984).

IV.

Ruling of Office of General Counsel of the DOE of May 22, 1984 "to clarify the scope of its remedial authority under the Emergency Petroleum Allocation Act, 15 U.S.C. 751 *et seq.*, and to address certain opinions that the Comptroller General of the United States has offered on the subject." This ruling was published in full in 49 F.R. pages 22063-22068, May 25, 1984, for the following express purpose: "Title 10 of the Code of Federal Regulations is hereby amended by adding Ruling 1984-1 to the Appendix to subchapter A to read as follows: . . . ." 49 F.R. 22063.

Addendum No. 2

Some Records of the DOE Concerning the Entitlements Program Since Decontrol Including a Regulation and "Final Decisions."

Regulation 10 C.F.R. § 211.69 *Entitlements Adjustment Mechanism*, as amended at 46 F.R. 43654, August 31, 1981; 46 F.R. 63209, December 31, 1981.

"Final Decision" of Economic Regulatory Administration (ERA) "not to issue the January 1981 and Final Entitlements Adjustments lists ('lists') thereby ending the Entitlements Program" and "intent to receive additional comments on the most appropriate manner to handle outstanding exception orders. DOE's tentative decision is not to give effect to the entitlements exception orders, but to consider potential mechanisms which would effectuate those orders under which firms would have received money." This order includes parts entitled: "I. The History of the Entitlements Program."; "II. The Decontrol Order and Subsequent Events Affecting the Issuance of Any Further Entitlements Lists."; "III. Decision."; "IV. Analysis of Public Comments."; "V. Treatment of Outstanding Exception Orders—Tentative Decisions."; "VI. Comments Requested."; "VII. Public Comment Procedures."; "VIII. Procedural Matters." 49 F.R. No. 129, 27410, July 3, 1984.

"Final Decision" of ERA of DOE "concerning the Department's policy on Entitlements exception orders. If the Office of Hearings and Appeals (OHA) determines that refiners as a class were injured by the overcharge activity, OHA will fund receive orders from that portion of refund money which corresponds to the injury sustained by refiners as a class. Dispense orders will not be effectuated." 50 F.R. No. 9, 1919, January 14, 1985. This decision includes parts entitled: "I. Introduction"; "II. Decision"; "III. Discussion of Comments"; and "IV. Procedural Matters." In part III, among other things, it is stated:

> "One commenter questioned the extent to which the Citronelle exception order would be affected by this proceeding. The Citronelle order was an exception relating to the Tertiary Incentive Program and the certification regulations. Issues related to the Citronelle order are being adjudicated before DOE and the Courts." 50 F.R. at 1925.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 78-1035

UNITED STATES OF AMERICA,
Plaintiff,

v.

EXXON CORPORATION,
Defendant.

March 25, 1983

MEMORANDUM OPINION

FLANNERY, District Judge.

This matter is before the court on cross-motions for summary judgment. Plaintiff Department of Energy ("DOE")[1] alleges that defendant Exxon Corporation ("Exxon") from January 1975 to January 1981 violated

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[1] The DOE, established in 1977 under the Department of Energy Organization Act, 42 U.S.C. § 7101 *et seq.*, has responsibility for the enforcement of federal oil price regulations. It was preceded in this task by the Federal Energy Administration ("FEA"), set up under the Federal Energy Administration Act, formerly 15 U.S.C. § 761 *et seq.*, which was in turn preceded by the Federal Energy Office, ("FEO") created following enactment of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 *et seq.* Where appropriate the DOE, FEA and FEO will be referred to interchangeably throughout this Opinion.

federal two-tier oil price-control regulations by selling as higher-priced "new" oil what should properly have been sold as lower-priced "old" oil. DOE alleges Exxon overcharged crude oil purchasers by failing properly to establish a unit-wide base production control level—the basis for calculations of "new" and "old" oil—for the Hawkins Field Unit, which it operates near Hawkins, Texas. DOE asks that Exxon be ordered to pay into the United States Treasury the alleged amount of overcharges—some $895 million—with interest from the date of overcharge, and that Exxon be assessed civil penalties of about $38 million.

In support of its cross-motion for summary judgment, Exxon argues that it is guilty of no overcharge because the rule DOE seeks to enforce against it is invalid as beyond the agency's statutory authority, arbitrarily and capriciously applied, issued without proper procedure, and finally, in any event, not applicable before September 1, 1976. In opposition to DOE's motion, Exxon argues that the regulations at issue, if valid, require the establishment of a unit base production control level only upon the occurrence of a "significant alteration in producing patterns", which occurred at the Hawkins Field no earlier than March 1977 and which, in any event, presents a disputed question of fact which may not be resolved on a motion for summary judgment.

For the reasons expressed below, plaintiff's motion for summary judgment is granted in part and denied in part. Defendant's motion is denied.

I. *Background*

A. *The Regulatory Framework*

In 1970 Congress passed the Economic Stabilization Act, Pub.L. No. 91-379, 84 Stat. 799, as amended 12 U.S.C. § 1904 note, authorizing the President to issue such orders as he felt appropriate in order to stabilize

prices. In the summer of 1971 the President imposed wage and price controls and delegated their enforcement to the newly-created Cost of Living Council ("CLC"). During the next few years these controls were gradually phased out, but because prices of petroleum products continued to climb, the CLC in August 1973 promulgated regulations applicable only to the oil industry. 6 C.F.R. Part 150, Subpart L (1974); 38 Fed.Reg. 22,536 (1973).

Just a few months later, after the Arab oil embargo had caused oil prices to jump sharply, Congress in November 1973 passed the Emergency Petroleum Allocation Act ("EPAA"), Pub.L. No. 93-159, 87 Stat. 628, 15 U.S.C. § 751 *et seq.* (1976), requiring the promulgation of regulations within 15 days. EPAA § 4(a). In January 1974, the new Federal Energy Office ("FEO") reissued the CLC price regulations, with only minor changes, at 10 C.F.R. Part 212, Subpart D (1975), 39 Fed.Reg. 1924, 1952 (1974) where they remained until the decontrol of petroleum prices in January 1981.

The heart of the petroleum price regulations was the application to domestically produced crude oil of a two-tier pricing structure designed to further the twin goals of combatting inflation while encouraging new domestic oil production. *Cities Services Co. v. FEA*, 529 F.2d 1016, 1020 (Em. App.1975). Producers were required to sell "old" crude oil at the lower-tier price and were allowed to sell "new" crude oil at a higher price. 10 C.F.R. §§ 272.73, 212.74 (1975).[2] Amounts of "old" and "new" oil were calculated by comparing current produc-

[2] Initially the price of new oil was simply not controlled; the regulations allowed it to be sold "without respect to the ceiling [lower-tier] price." 10 C.F.R. § 212.72 (1975). However, in February 1976, in implementing the Congressional directives of Section 401(a) of the Energy Policy and Conservation Act ("EPCA"), Pub.L. No. 94-163, Title IV, 89 Stat. 871, 941 (1975), 15 U.S.C. §§ 757 *et seq.*, the FEA established the upper-tier ceiling price for new oil. 41 Fed.Reg. 4931, 4932 (1976).

tion at a given property to that property's production in an earlier corresponding base period, its "base production control level" ("BPCL").[3] Any excess of current production above the BPCL could be sold as higher-priced new oil. All current production up to the BPCL, however, had to be sold as lower-priced old oil.[4]

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[3] The initial base period was calendar year 1972. 10 C.F.R. § 212.72 (1975). The FEA recognized, however, that as production at older fields declined naturally, it became increasingly difficult for producers to boost production above 1972 levels, and the lure of higher new oil prices no longer served as a realistic incentive to increased production. 41 Fed.Reg. 4931, 4932-33 (1976). Consequently, in February 1976 the FEA amended the regulations to provide producers with a choice. For production after February 1, 1976, producers could choose as their monthly BPCL either corresponding monthly 1972 production levels or average monthly 1975 production. 10 C.F.R. § 212.72 (1977); 41 Fed.Reg. 4931, 4932-33 (1976). In 1979 the DOE added a third choice for production after May 31, 1979: the BPCL could be based on average monthly production in the six-month period ending March 31, 1979. 10 C.F.R. § 212.72 (1980); 44 Fed.Reg. 25,160; 25,167 (1979).

[4] The 1974 regulations provided a bonus of sorts. For every barrel of new oil produced, a producer could sell one barrel of "released" oil at the higher, uncontrolled price, 10 C.F.R. §§ 212.72, 212.74 (1975). Provisions for releasing lower-tier crude oil to the upper tier were eliminated as of February 1, 1976. 10 C.F.R. § 212.72 (1977); 41 Fed.Reg. 4931, 4933 (1976).

In fact, the calculation of new and old oil is further complicated by the regulation regarding "current cumulative deficiency." Once a producer had sold new oil in a particular month (i.e., exceeded the BPCL), any amount, in any succeeding month, by which production fell short of the BPCL, constituted a "deficiency." The sum of such deficiencies constituted the "current cumulative deficiency." 10 C.F.R. § 212.72 (1975). Any later production above the BPCL first had to be applied to reduce the current cumulative deficiency before it could be accounted for as new oil. *Id.* The revised definition of BPCL contained in the February 1976 amendments to the regulations eliminated, effective February 1, 1976,

While the regulations appear conceptually to be relatively straightforward, their application in some instances proved to be problematic. For example, the regulations required that a BPCL be established for every oil-producing "property." 10 C.F.R. § 212.72 (1975). "Property" was defined as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum." *Id.*[5] The question arose, which is now at the heart of this lawsuit, as to the proper method of calculating a BPCL for large, multilease tracts which during the base year had operated as independent, competing properties but which subsequent to 1972 had embarked upon the cooperative production process known as unitization.[6]

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all then-existing current cumulative deficiencies. 41 Fed.Reg. 4931, 4933.

Finally, under the 1974 regulations, production from stripper well leases was exempt from price control, as required by Section 4(e)(2) of the EPAA. 10 C.F.R. § 210.32 (1975). Stripper well leases were defined as leases on which average daily production per well did not exceed ten barrels. 10 C.F.R. § 212.32(b). In February 1976 when the FEA first imposed a ceiling price on new oil, it eliminated the stripper well exemption also, and provided for it to be sold at upper-tier ceiling prices. 10 C.F.R. § 212.74 (1977); 41 Fed.Reg. 4931, 4940 (1976). The ceiling price on stripper well oil was short-lived, however, as Congress in its August 1976 amendments to the EPAA again required its complete exemption. Energy Conservation and Production Act ("ECPA"), Pub.L. No. 94-385, Section 121, 90 Stat. 1125, 1133, 15 U.S.C. § 757(i). The FEA incorporated the exemption into the regulation in October 1976. 10 C.F.R. § 212.54 (1977); 41 Fed.Reg. 48,323 (1976).

[5] The FEO took the property definition unchanged from the previous CLC regulations at 6 C.F.R. § 150.354 (1974). The definition was grammatically altered in 1976 to read "the right to produce domestic crude oil, which arises from a lease or from a fee interest." 10 C.F.R. § 212.72 (1977); 41 Fed. Reg. 4931, 4940 (1976).

[6] Often numerous competing leaseholds may overlay a single large reservoir of oil. Years of competitive exploitation grad-

Did the regulations require that the BPCL for fields unitized after 1972 be established field-wide, by totalling the 1972 production of all properties which made up the unit, or could the BPCL be calculated on an individual, lease-by-lease basis?

To address this issue, the Federal Energy Administration ("FEA") in August 1975 issued Ruling 1975-15 interpreting the existing regulations. 40 Fed.Reg. 40,832 (1975).[7] In Ruling 1975-15 the FEA emphasized that the property concept in the regulations was based on the right to produce crude oil, however arising, and on the need to ensure a meaningful comparison between current and base year production. *Id.* Accordingly, the FEA ruled that in the case of properties unitized after 1972,

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ually deplete the reservoir, however, and as natural reservoir pressure lessens annual production may decline. *See* Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment ("Pltf. Mem.") at 10. To reverse this decline, producers can undertake various enhanced recovery efforts to increase the pressure in the reservoir, for example through the injection of liquids or gases. *Id.* To do so, however, the previously competing leaseholders must generally group their interests and form a single unit comprising all of the interests in the single reservoir of oil. This grouping of interests, usually embodied in a "Unit Agreement," is known as unitization. *Id.*

These efforts will most likely result in the shutting in altogether of wells within certain leaseholds and increasing the production at others, as the enhanced recovery efforts cause oil to flow underground across lease lines. *See* 41 Fed.Reg. 1564, 1569-70 (1976). Consequently, payments to unit participants are based not on the actual production of a particular participant's wells, but on an imputed percentage of the unit's total production. *Id.*

[7] Preceding the issuance of Ruling 1975-15, in response to requests from producers in late 1974 and early 1975, the FEA issued five formal Interpretations on the subject of the application of the definition of "property" to unitized properties, later published at 42 Fed.Reg. 23,723; 23,726; 23,730 and 25,659 (1977).

the producer was required to calculate a unit-wide BPCL by totalling the individual 1972 monthly production for each of the leases constituting the unit. *Id.* Lease-by-lease calculations were not allowed.

Ruling 1975-15 sparked criticism from the oil industry that the unit BPCL requirement would discourage unitization and hence retard efforts to increase domestic production. *See* 41 Fed.Reg. 1564, 1569 (1976).[8] Furthermore, in December 1975 Congress passed the Energy Policy and Conservation Act ("EPCA"), Pub.L. No. 94-163, Title IV, 89 Stat. 871, 941 (1975), 15 U.S.C. §§ 757 *et seq*, which among other things directed the FEA to promulgate amendments to the oil price regulations which would stimulate domestic production while at the same time combatting inflation in the prices of petroleum products. EPCA § 401(a); S.Rep. No. 516, 94th Cong., 1st Sess. 116-17, 120-21 (1975); U.S.Code Cong. & Admin. News p. 1762. To achieve these sometimes conflicting goals, Congress directed the FEA to create different classifications of crude oil which would bear different prices. 15 U.S.C. § 757(a). The weighted average price per barrel was not to exceed $7.66. *Id.* To ensure that higher prices would reward only real increases in production, Congress provided specifically in Section 401(a) of the EPCA that no amendment to the regulation could allow the price of any old oil to increase above the existing ceiling, unless the President specifically found that

[8] The FEA described two ways in which the unit BPCL requirement could block unitization by discouraging potential participants from entering unit agreements. Producers of stripper well leases might hesitate to join if, when their production was averaged with that of other unit participants, their lease would lose its exempt or upper-tier status. A producer of much new crude oil might similarly hesitate, if the effect of his joining the unit would be to reclassify much or all of his new oil production as old oil due to the relatively low production on neighboring leases. *See* 41 Fed.Reg. 1564, 1570-71 (1976).

such an amendment would give positive incentives for enhanced recovery techniques, or was necessary to take into account declining production at a property, and would likely result in production greater than what would have occurred in the absence of the amendment. EPCA § 401(a); 15 U.S.C. § 757(b)(2).[9] "Old oil production" was defined in the EPCA as the average production of old oil, as defined in Section 212.72, at a particular property in the months of September, October, and November of 1975. 15 U.S.C. § 757(b)(3).

In reaction to the industry criticism, and pursuant to the Congressional directives in the EPCA, the FEA in February 1976 amended the oil price regulations. 41 Fed. Reg. 4931 (1976). In response to the Congressional desire for increased production,[10] the amendments addressed three different but overlapping objectives: to provide production incentives generally, to provide incentives for the maintenance of existing units, and to remove disincentives to prospective unitization.[11]

The FEA noted in the preamble to the amendments that production had so declined at older properties that producers could no longer realistically expect to boost volume above 1972 levels, thereby rendering ineffective the lure of higher new oil prices. *Id.* at 4932. Accord-

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[9] 15 U.S.C. § 757(b)(2) in fact provides that the President could find that the price increase would stimulate enhanced recovery projects or deep horizon development, but the latter is not relevant to this action.

[10] Part of the FEA response to Congressional desires as to price control was to establish a ceiling price for new oil, which had theretofore been sold without regard to price controls. *See* n. 2, *supra.* The FEA was equally conscious of moderating average oil prices when it selectively applied incentives for unitized properties, depending on the date of unitization. *See* discussion at pp. 821-22, *infra.*

[11] *See* S.Rep. No. 516, 94th Cong., 1st Sess. 190-91 (1975); 41 Fed.Reg. 4931, 4932 (1976).

ingly, the FEA first amended Section 212.72 to provide producers at all properties the option of choosing a more recent, and presumably lower, BPCL based on average old oil production in 1975, rather than 1972. *Id.* at 4933; *see* n. 3, *supra*. In the same spirit, the FEA eliminated all deficiencies which had accumulated prior to February 1, 1976. 41 Fed.Reg. at 4933. In effect, all properties could begin afresh with a new BPCL and a more realistic chance of producing new oil. *Id.*

In addition, the FEA provided other incentives specifically for unitized properties. The first, applicable to both existing units and those to be formed on or after February 1, 1976, provided that Ruling 1975-15 was rescinded *ab initio* insofar as it required the unit operator to calculate a unit-wide BPCL as of the date of unitization. *Id.* at 4937. Instead, operators could continue to account for production on a lease-by-lease basis until enhanced recovery operations had begun or a significant alteration in producing patterns occurred within the unit. *Id.*

The agency defined "enhanced recovery" as "any method of recovering crude oil in which part of the energy employed to move the crude oil through the reservoir is applied from extraneous sources by the injection of liquids or gases into the reservoir." *Id.* at 4941. A definition of "significant alteration" proved more elusive. The FEA hinted that a significant alteration might occur before an enhanced recovery project had begun operating when "production from certain leases is reduced or discontinued in preparation for enhanced recovery operations." *Id.* at 4937. Although the agency used the term "substantially altered" in its unit BPCL rule, it did not then formally define the term, choosing instead to issue a later Ruling to clarify its meaning. *Id.*

Finally, to further encourage prospective unitization, the FEA enacted a new regulation applicable only to properties unitized after February 1, 1976. *Id.* at 4938.

Such units could benefit, first, from a special rule allowing the BPCL to be calculated not on the basis of 1972 or 1975 production, but on the basis of average production in the twelve months preceding the calculation of a unit BPCL, i.e., preceding the date on which a significant alteration in producing patterns occurred or enhanced recovery operations were implemented. *Id.* In addition, the new regulation allowed a modified carryover of the stripper well lease exemption. *See* n. 4, *supra.* Producers at new units could sell at upper-tier prices a volume of crude oil equal to the average volume of stripper well lease production in the twelve months preceding the establishment of a unit BPCL. 41 Fed.Reg. at 4941.

In August 1976 the FEA furnished the promised clarification of "significant alteration in producing patterns," defining it as "the occurrence of either (1) the application of extraneous energy sources by the injection of liquids or gases into the reservoir, or (2) the increase of production allowables for any property that constitutes the unitized property." 41 Fed.Reg. 36,172, 36,184 (1976).[12] At the same time, to eliminate any remaining disincentives to prospective unitization, the FEA adopted a special rule, applicable to units formed after September 1, 1976, to ensure that once a unit BPCL was established there could be no decrease in the absolute volumes of new oil. Producers at such units would be allowed to sell at upper-tier prices a volume of oil equal to the average volume of new oil produced from the constituent properties in the twelve months preceding establishment of a unit BPCL. *Id.* at 36,182, 36,184.

Finally, to dispel any remaining confusion as to the effect of the 1976 amendments to the regulations, the

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[12] Since "significant alteration in producing patterns" had been defined and because the unit BPCL rule applied to all units regardless of whether they were formed for enhanced recovery purposes, the definition of "enhanced recovery project" was deleted from the regulation effective September 1, 1976. 41 Fed.Reg. 36,172; 36,182.

FEA in January 1977 issued Ruling 1977-2. 42 Fed.Reg. 4409 (1977). In that Ruling the FEA made clear that the partial rescission in February 1976 of Ruling 1975-15 allowed operators of units formed before February 1, 1976 to wait, before establishing a unit BPCL, until a significant alteration in producing patterns occurred. Accounting for volumes of new and old oil after the 1976 amendments depended on when the unit was formed and when a significant alteration occurred or enhanced recovery operations were implemented. Section 212.72 applied to units formed before February 1, 1976, and those units received none of the incentives of Section 212.75.[13] Units formed after February 1, 1976 received those benefits of Section 212.75 in effect at the time the operator had to calculate a unit BPCL—the special unit BPCL rule and imputed stripper oil provisions after February 1, 1976, and the provisions for imputed new oil after September 1, 1976. *Id.* at 4415; *see* n. 33, *infra.*

B. *Facts*

1. *Hawkins Field*

In Decembmer 1940, oil was discovered at the Hawkins Field, a ten thousand acre field twenty miles north of the town of Tyler in Wood County, Texas. By the late 1940's, more than 200 individuals and companies produced oil

[13] *But see* n. 35, *infra.* In addition, the FEA recognized that, as to units at which a significant alteration in producing patterns occurred before February 1, 1976, the regulatory term was not then formally defined. In Ruling 1977-2 the agency stated that the definition effective September 1, 1976, would be used as guidance in conducting compliance audits of pre-1976 units. 42 Fed.Reg. at 4415. Moreover, operators of such units would be allowed to justify the choosing of the date of a "significant alteration" on "reasonable bases other than those specified by the present definition." *Id.* The court rejects the agency's characterization of its action as a relaxation of enforcement policy, but nevertheless upholds its retroactive application. *See* pp. 835-36, *infra*; *see also* n. 38, *infra.*

from the Hawkins field on more than 300 leases or tracts within the field. To promote rational exploitation of the field, the Texas Railroad Commission ("TRRC") regulated the number of oil wells within the field, as well as the number of barrels of oil each well could produce, termed production "allowables." PX 5.[14] In addition, the TRRC established a Maximum Efficient Rate ("MER") of production for the field, a limit on the number of barrels which daily could be pumped from the field as a whole. *Id.* Still, by the mid-1960's years of competitive exploitation had so drained the field that natural reservoir pressure declined, allowing the invasion of the crude oil bearing formations by water and the irrevocable loss of oil into the field's original gas cap. Def.Mem. at 14-17. The Hawkins Field interest owners, led by Exxon,[15] owner of two-thirds of the field's production, concluded that this declining trend could be reversed, and the life of the field prolonged, only by means of a cooperative enhanced recovery project. Def.Mem. at 19.

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[14] The various pleadings and exhibits attached thereto filed in connection with the parties' cross-motions for summary judgment shall herein receive the following designations:

(1) Plaintiff's Memorandum in Support of Motion for Summary Judgment: "Pltf. Mem."
(2) Exhibits to Pltf.Mem: "PX"
(3) Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment: "Def. Opp."
(4) Exhibits to Def. Opp.: "DX Opp."
(5) Defendant's Memorandum in Support of Motion for Summary Judgment: "Def. Mem."
(6) Exhibits to Def. Mem.: "DX"
(7) Plaintiff's Opposition to Defendant's Motion for Summary Judgment: "Pltf. Opp."

[15] At the time of the initial efforts towards unitization, Exxon's interests were in fact held by its predecessor corporations, Humble Oil and Refining Company. For the sake of clarity and simplicity, references made to Exxon shall be understood to mean Humble where appropriate.

Based on engineering studies conducted at that time, the owners concluded that their enhanced recovery efforts would require the construction of a plant for the production of inert gas to be injected underground in order to increase reservoir pressure. *Id.* Before the program could be implemented, however, the field had to be unitized, in part so that the cost of the inert gas plant could be spread among the owners, but also because the injection of gas would cause crude oil to flow underground across lease lines. *Id.* at 20; *see* n.6, *supra.* Accordingly, as early as 1969 Exxon began promoting unitization. Def. Opp. at 6. Its efforts began in earnest in the summer of 1971 when it first met with the more than 300 other working interest owners of the field. *Id.* Negotiations with these owners, as well as the more than 2200 royalty interest owners, continued for the next few years and culminated in the signing of a Unit Agreement in 1974. DX Intro-4. The agreement named Exxon as unit operator, and provided for the sharing of costs of the inert gas enhanced recovery project. *Id.* art. 11.1. Production, too, was to be shared, according to a formula by which the imputed share attributed to each tract was based on estimates of the recoverable reserves under each tract. *Id.* arts. 5, 6. The TRRC approved the agreement on November 26, 1974, permitting Exxon to take the steps necessary to implement the enhanced recovery project, and providing Exxon with a unit production allowable as of the effective date of unitization, January 1, 1975. DX Intro. 2. Under prior TRRC orders, the production allowables of a shut-in well could be transferred only pro rata among the other wells at the Hawkins Field. The unit allowable, equal to the then existing MER of approximately 112,000 barrels per day, would allow Exxon to transfer production among wells in the unit at will.

At the same time that Exxon began its unitization efforts in 1969, it sought and received permission from the TRRC for an interim conservation project designed

to curb the loss of crude oil at the field during the years needed to unitize the field and to implement the inert gas recovery project. The interim project called for the injection of up to 20 million cubic feet of natural gas per day, extraction of water, and increasing crude oil production. *See* PX 4 at 4. Accordingly, in its order approving the interim project, the TRRC authorized the increase of the Hawkins Field MER from 87,000 barrels per day to 112,000 barrels per day. PX 5. Shortly thereafter the rate of production was boosted up to the new, higher MER, and Exxon began injecting natural gas. It continued the natural gas injections throughout the succeeding years, beyond the effective date of unitization, until the completion of the inert gas plant. The inert gas plant, completed at a cost of some $57 million, commenced operations in March 1977. Def.Mem. at 4.

2. *Exxon's Application of the Oil Price Regulations at Hawkins Field*

As noted above,[16] the CLC in August 1973 promulgated the initial oil price regulations. Those regulations required the calculations of a BPCL for each "property." "Property" was defined as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum." At the time the CLC regulations were promulgated, Exxon already operated several multilease units. Consequently, Exxon had to determine how the regulations would apply to those units. In the fall of 1973 Exxon issued instructions to its employees to treat each unit as a single "property" under the regulations with a single, unit BPCL. PX 46. Indeed, Exxon provided specific instructions for units which, as would be the case of Hawkins Field, were formed after 1972, the base year designated in the regulations for the calcula-

[16] For a more detailed description of the regulations and their evolution, including relevant citations, *see* discussion at pp. 818-22, *supra*.

tion of the BPCL. For such units, Exxon instructed its employees that:

> To arrive at the base production control level for the unit, sum by individual months the determined . . . base production control level for each accounting lease . . . contributed to the unit.

Id. at 7. In accordance with those instructions, Exxon applied an aggregated, unit BPCL at units it operated in Texas, California, Alabama and Florida. PX 76.

Exxon departed from its prior practice, however, at the Hawkins Field unit. In February 1974, Mr. Sidney J. Reso, Production Manager of Exxon's East Texas Division and supervisor of the effort to unitize Hawkins Field, suggested in a memorandum to his superiors that old and new oil at the Hawkins Field unit be calculated on a lease-by-lease, rather than a unit basis. PX 56. To do otherwise, Mr. Reso warned, would result upon unitization in an 80% reduction in the amount of new, released and stripper oil to be claimed by prospective unit participants. *Id.* In the spring of 1974 a task force was formed at Exxon to study Mr. Reso's suggestion. Def. Opp. at 17. That task force solicited the views of Exxon's in-house counsel as to the legality of Mr. Reso's suggestion under the regulations. On August 8, 1974, Mr. Fred W. File, an attorney in Exxon's legal department, issued a three-page opinion concluding that Mr. Reso's proposal would be acceptable under then applicable FEA regulations. PX 77. Mr. File identified the purpose of the regulations' two-tier pricing system as being to promote additional recovery of crude oil. *Id.* at 2. The application of a unit BPCL to the Hawkins Field unit would result, as Mr. Reso had noted, in a reduction in the amount of new and released oil which unit participants would be able to claim. Such a result, Mr. File concluded, was inconsistent with the regulations' purpose and therefore was "clearly not within [their] intent." *Id.* Mr. File qualified his opinion, however, by noting that "FEA regulations are

subject to frequent interpretations and revisions" and that sale of oil from the unit would be controlled by regulations in effect on the date of sale. *Id.* at 3. Nevertheless, he concluded, it would be appropriate to advise other Hawkins Field interest owners that lease-by-lease calculations would be acceptable under the regulations then in effect. *Id.*

Within a few weeks of the issuance of Mr. File's opinion, Exxon so notified the prospective Hawkins Field unit participants. When Hawkins Field was formally unitized on January 1, 1975, and in the many months thereafter, Exxon did in fact apply individual, lease-by-lease BPCL calculations.

Recognizing that the restructuring of fields after 1972, such as by unitization, raised certain questions under the regulations, the FEA in August 1975 issued Ruling 1975-15, which made explicit the regulations' requirement that a unit BPCL, equal to the sum of the BPCL's of the constituent properties, be calculated and applied to every unit as of the date of unitization. Exxon representatives joined in the chorus of industry criticism of Ruling 1975-15 and met on several occasions in the fall of 1975 with various FEA officials. On November 24, 1975, Mr. File, the author of the August 1974 legal opinion to Mr. Reso, met with FEA General Counsel Michael Butler and presented him with written comments criticizing Ruling 1975-15 as creating insurmountable disincentives to unitization, and asking for its modification or clarification. DX I-3. Three weeks later Mr. Butler informed Mr. File that the FEA was not then considering modification or rescission of Ruling 1975-15, but that the FEA intended shortly to initiate a rule making proceeding to address the special problems associated with enhanced recovery projects at unitized fields. DX Opp. CS-44.

On January 6, 1976, the FEA published a notice of such a rule making, advancing the proposals which were eventually embodied in the February 1976 amendments

to the oil price regulations. In its comments on the proposed regulations, Exxon embraced several of the FEA proposals, but suggested that the provision for lease-by-lease calculation of exempt oil should be extended for two years after formation of the unit or until implementation of the injection operations of an enhanced recovery project. PX 18[illegible] at 9. Moreover, to prevent the dissolution of existing units, Exxon requested that the same rules be applied to units formed before February 1, 1976. *Id.* Instead, the FEA in the February amendments chose to apply only some of the newly created incentives to pre-existing units, and provided that new Section 212.75 would apply only prospectively. The "significant alterations" test, applicable to both, was not defined.

Although heartened by the rescission of Ruling 1975-15, Exxon remained uncertain as to the proper method of accounting for oil at the Hawkins Field Unit, due to the absence of any definition of "significant alteration in producing patterns." After meeting again in mid-February with FEA officials, DX Opp. CS-61, Exxon concluded that until the FEA clarified the meaning of the new regulations, it would be proper to continue its lease-by-lease calculations at the Hawkins Field, and so advised the other Hawkins interest owners. DX Opp. CS-62.

In April 1976, the FEA sought comments as to how best to determine when there occurred "a significant alteration in producing patterns." Exxon responded as it had earlier, namely, suggesting that "significant alteration" be defined as "the initiation of the major injection or other programs contemplated by the unit, provided however that the date will be no longer than two years from the formation of the unit." DX Opp. CS-68 at Appendix 3, p.2. In August the FEA finally published the long-promised clarification defining "significant alteration in producing patterns," effective September 1, 1976, as either the injection of liquids or gases into the reservoir or the increase of production allowables for any

property constituting the unit. Although still puzzled by this definition as it applied to the Hawkins Field Unit, Exxon attorney Fred File concluded that it did require the calculation of an aggregated, unit BPCL. DX Opp. CS-75. Accordingly, Exxon did calculate such a unit BPCL for the Hawkins Field Unit, but, noting that no definition had existed before that time, did so only as of September 1, 1976, and then under the more generous provisions of Section 212.75. Exxon continued to account for oil production at the Hawkins Field Unit in this manner until the repeal of the oil price regulations in January 1981.

From January 1975 through August 1976 production at the Hawkins Field remained relatively stable at about 112,000 barrels per day. *See* DX 288. Thereafter, despite the implementation of the inert gas enhanced recovery project in March 1977, production began to decline, to about 90,000 barrels per day in July 1977, and finally dropping to about 45,000 barrels per day in January 1981 at the time oil prices were decontrolled. *Id.* Despite the steady decline in production, an increasing percentage of oil was accounted for by Exxon as upper-tier, higher-priced oil, until beginning June 1, 1979, almost all of the then 62,000 barrels per day was classified as new oil. *Id.*; *see* Plaintiff's Appendix of Charts and Graphs, F.

In January of 1978 the DOE issued to Exxon a Notice of Probable Violation, charging it with violating the oil price regulations in its sale of crude oil produced at the Hawkins Field Unit. On June 8, 1978, the DOE brought this enforcement action.

II. *The Unit Property Rule*

DOE maintains that the Hawkins Field Unit, because it was formed before February 1976, has always been subject solely to the requirement of 10 C.F.R. § 212.72 that a unit BPCL be established as of the date of unitization. DOE asserts further that the validity of this

requirement, referred to herein as the unit property rule, has been definitively resolved by the Temporary Emergency Court of Appeals ("TECA") in *Pennzoil Co. v. DOE*, 680 F.2d 156 (Em.App. 1982), *cert. dismissed*, —— U.S. ——, 103 S.Ct. 841, 74 L.Ed.2d 1032 (1983) and that the test of significant alteration in producing patterns, first announced in the preamble to the February 1976 regulations, is relevant to pre-existing units only as guidance in its relaxed enforcement policy.

Exxon denies any controlling effect to the *Pennzoil* case and launches a wide-ranging attack on both the procedural and substantive validity of the unit property rule. The February 1976 amendments to the regulation, Exxon maintains, were not before the *Pennzoil* court. The significant alterations test constituted an entirely new regulation, Exxon continues, which cannot be given retroactive effect and which, as applied by DOE, arbitrarily discriminates between units formed before and after February 1976.

A. *Procedural Validity*

Exxon properly notes that the TECA in *Pennzoil* did not have before it the question of the procedural regularity of the issuance of the original CLC regulations in 1973.[17] Exxon argues that the issuance of those regulations was fatally flawed because the notice of proposed rulemaking gave no hint that a unit would be considered a single "property."

Section 207(c) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, applied to the CLC the informal rulemaking requirements of Section 4 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. Section 4(a) of the APA requires that "notice of proposed rule-making . . . shall include . . . either the

[17] The court specified that "[n]o one has claimed that there was any flaw in the rule-making encompassing the property definition." 680 F.2d at 167.

terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). The purpose of the notice requirement is to afford interested parties a meaningful opportunity to participate in the rulemaking process. *McCulloch Gas Processing v. DOE*, 650 F.2d 1216, 1221 (Em.App.1981). Notice is sufficient if it "fairly apprise[s] the interested persons of the 'subjects and issues' before the agency." *Id.* at 1222, quoting *American Iron and Steel Institute v. EPA*, 568 F.2d 284, 291 (3d Cir.1977).

Under the two-tier pricing structure proposed by the CLC on July 20, 1973, increased or "new" oil production was to be measured for each "property" on which the producer "has leased" or "owns production rights." 38 Fed.Reg. 19,464; 19,482 (1973). Any amount by which current production exceeded 1972 production in a given month could be sold free of price controls. *Id.*

Exxon first complains that the "right to produce" concept underlying the unit property rule was absent from the July 20th notice. Plainly, the proposed regulations did not state in so many words that a unit would be considered a single property. Such precision is not required, however, in order to "fairly apprise" interested parties of the issues before the agency, and reaction to the notice here shows that interested parties were in fact properly alerted. Nine industry commenters specifically addressed the need for a precise definition of the term "property". *Pennzoil Co. v. DOE*, *supra*, 680 F.2d at 161. Of these, seven suggested that a unit would or should be considered a single property.[18]

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[18] The nine industry commenters included Gulf Oil Corporation, PX 27; Exchange Oil & Gas Corporation, PX 26; Union Oil Company of California, PX 28; Texaco, Inc., PX 30; Andover Oil Company, PX 24; Phillips Petroleum Company, PX 25; Ashland Oil, Inc., PX 23; Ernest Cockrell, an independent oil and gas producer, PX 22; and the Denver law firm of Holme Roberts & Owen, PX 31. The FEA received a total of 272 comments, all of which it considered despite the fact that 110 were filed late. 38 Fed.Reg. 22,536.

Nor was Exxon as befuddled as it now claims to have been. An internal Exxon memorandum written only days after publication of the proposed rules interpreted them to require that a " 'base production control level' [be] calculated for each property (Lease or Unit) each month. . . ." PX 21. Mr. M.A. Wright, Chief Executive Officer of Exxon U.S.A., evinced his understanding of the unit property rule when he complained to CLC Director John Dunlop that secondary recovery operations might "substantially extend the producing life of older fields without producing 'new' oil under the Phase IV rules." PX 29 at 11; PX 32 at 8-10. Two weeks after Mr. Wright's comments an Exxon representative attended a mid-August CLC conference at which he learned that a unit of oil leases would be considered a single property under the proposed regulations and that "production levels from the combined properties would have to exceed 1972 levels before they were considered to be producing new oil." PX 37. Finally, and most significant, Exxon belied its claimed incomprehension when it applied a unit BPCL without hesitation at its Webster Unit on September 1, 1973, just days after the final regulation was published. PX 76.[19]

But Exxon's complaint goes further. The final regulations, it claims, differed so substantially from their proposed form as to render the opportunity to comment meaningless and hence the regulation invalid. The court notes at the outset that the fact that a final rule differs, even substantially, from the published proposal, is not fatal; modification of proposed rules does not automati-

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[19] That a party follows the clear commands of a final rule does not necessarily prove that it has received sufficient notice of the proposed rule, but where, as in the instant case, the final rule differed so little from the proposed rule, *see* discussion at p. 828, *infra*, Exxon's unhesitating compliance with the unit property rule on September 1, 1973 is certainly evidence that it understood the virtually identical proposed rule a month earlier.

cally generate a new round of notice and comment. *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir.1979); *International Harvester Co. v. Ruckleshaus*, 478 F.2d 615, 632 (D.C.Cir.1973). As the court wrote in *Trans-Pacific Freight v. Federal Maritime Commission*, 650 F.2d 1235, 1249 (D.C.Cir.1980), "[t]he whole rationale of notice and comment rests on the expectation that the final rules will be somewhat different—and improved—from the rules originally proposed by the agency."

Yet such explanations are unnecessary here, where that portion of the rule *sub judice*, as finally promulgated, differs hardly at all from its proposed form. Admittedly, the CLC noted in the preamble to the final rule that "subpart L in its final form has been changed extensively from the proposal that was published on July 19, 1973." 38 Fed.Reg. 22,536. Comparison of the proposed and final forms reveals, however, that the changes were made primarily in those parts of Subpart L dealing with refiners and retailers, and not in that part dealing with crude oil production. *Compare* 6 C.F.R. §§ 150.355—150.363 (1974), 38 Fed.Reg. 22,539—22,543, *with* proposed rules 6 C.F.R. §§ 150.355—150.362, 38 Fed.Reg. 19,482—19,483. To be sure, the word property was separately defined in final form, as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum." 6 C.F.R. § 150.354(b) (1974), 38 Fed. Reg. at 22,538. But the proposed formula for calculation of new and old oil referred to the property at which a producer "has leased" or "owns production rights." 38 Fed.Reg. at 19,482. This court perceives no real difference, much less a substantial one, between the two forms.

Contrary to Exxon's contentions, the notice and comment provisions of the APA "d[o] not require every aspect of the proposed order to be explained in the general notice." *Common Carrier Conference v. United States*, 534 F.2d 981, 982-83 (D.C. Cir. 1976), *cert. de-*

nied 429 U.S. 921, 97 S.Ct. 317, 50 L.Ed.2d 288 (1976). Industry reactions to the CLC proposal, including that of Exxon, indicates that "[t]he industry was generally on notice" as to the workings of the two-tier pricing structure, *id.*, thereby satisfying the notice and comment requirements of the APA.

Exxon contends, however, that CLC failed to satisfy the second requirement of APA procedures for informal rulemaking, namely, that the agency publish, along with the final rules, "a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). The CLC, says Exxon, failed to do so, rendering the oil price regulation invalid.

The primary purpose of requiring a contemporaneous statement of basis and purpose is to enable a reviewing court to judge the reasonableness of a rule in light of its stated aims. *American Standard, Inc. v. United States*, 602 F.2d 256, 269, 220 Ct.Cl. 411 (Ct.Cl. 1979). But informal rulemaking does not demand an exhaustive listing of factual findings, nor a full reasoned analysis, but instead a "concise general statement." *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 883-84 (D.C. Cir. 1979); *see* 1 K. Davis, *Administrative Law Treatise* § 6:12 (2d ed. 1978). And where the agency's aims are obvious and unmistakable, courts have upheld rules with no statement of basis and purpose. *See Tabor v. Joint Board for Enrollment of Actuaries*, 566 F.2d 705, 710 (D.C. Cir. 1977); *Alabama Ass'n of Insurance Agents v. Board of Governors of the Federal Reserve System*, 533 F.2d 224, 236 (5th Cir. 1976); *Hoving Corp. v. FTC*, 290 F.2d 803, 807 (2d Cir. 1961); *American Standard, Inc. v. United States, supra*, 602 F.2d at 269. Examination of the preamble to the final oil price regulation, along with contemporaneous agency statements cited therein, when viewed in the surrounding regulatory context, provides ample evidence from which a reviewing court may discern the basis and purpose not only of the regulation

generally, but also of that part of it about which Exxon complains, the unit property rule.

> The preamble to the final rules stated: A 2-tier price system has been adopted, providing for a ceiling on domestic crude petroleum prices but allowing new crude and an equivalent amount of old crude to be sold at prices above the ceiling.

38 Fed. Reg. 22,536. Implicit in a structure which rewards only additional production with higher prices, and obvious even to those less sophisticated than Exxon, is a goal of inducing increased domestic crude oil production while keeping average prices down. But if Exxon could not glean that meaning from the regulation alone, the preamble referred to an August 10th press release from CLC Director John Dunlop which unequivocally stated:

> The Council has been very concerned that the final regulations strike a delicate balance between constraining prices while at the same time encouraging the necessary increase in supplies which the country must have.
>
> . . . . .
>
> The "2-tier" pricing system . . . is expected to stimulate domestic crude oil production while maintaining price controls on oil presently being produced. The "2-tier" system will encourage increased investment in domestic exploration and will provide an economic incentive to allow the recovery of a larger percentage of oil in existing reservoirs.

PX 36.

Not only were the CLC's twin goals implicit in the regulation, but the unit property rule itself, requiring that each unit be treated as a single property, inhered as well in the regulations when viewed in the context of the surrounding statutory scheme. The 1973 CLC oil price regulations were but a small part of the fourth phase of the economy-wide federal program of price

controls to which the oil industry, including Exxon, had long been subject. As such, the CLC regulations carried forth the primary statutory mandate to hold down prices of crude oil by putting a ceiling price on much of domestic production. The CLC's attempt to boost domestic oil production while keeping prices down could succeed only if production increases were real and not the result of gerrymandering. Even Exxon perceptively noted in its comments to the proposed regulations that one possible result of the two-tier price system could be that a producer's "strongest incentive would be to obtain higher prices by arranging production in such a way as to shift oil into the 'new' category to the maximum extent possible." PX 32 at 9. The unit property rule was implicit in the regulation because, as the TECA has already found, it was dictated by the CLC's "duty to reasonably inhibit gerrymandering of boundaries undertaken to avoid price controls." *Pennzoil Co. v. DOE*, *supra*, 680 F.2d at 169.

The explicit agency pronouncements as to the basis and purpose of the August 1973 oil price regulations not only satisfy the requirements of a concise, general statement, but surpass that requirement insofar as the regulations' basis and purpose were clear from the regulations themselves and hence in need of little further explication.

Accordingly, the court finds that the August 1973 CLC oil price regulations were issued in accordance with all the applicable procedural requirements of the APA.

B. *Substantive validity*

1. *Stripper well exemption*

In the first of several attacks on the substantive validity of the unit property rule, Exxon argues that to require a unit containing stripper well leases to be treated as a single property is unlawful because to do so would

contravene the intent of Congress when it exempted stripper well oil from price controls. In support of its argument Exxon first traces the evolution of the stripper well exemption through its several manifestations,[20] from its original enactment in the mid-November 1973 Trans-Alaska Pipeline Authorization Act ("TAPAA"), Pub. L. No. 93-153, § 406, 87 Stat. 576, 590, its virtually identical reenactment only days thereafter in the EPAA in late November 1973, the brief subjection of stripper well oil to upper-tier ceiling prices as mandated by the EPCA in December 1975, and the final return of stripper well production to exemption in August 1976 under the Energy Conservation and Production Act ("ECPA"), Pub. L. No. 94-385, § 121, 90 Stat. 1125, 1132-33, 15 U.S.C. § 757(i). Exempt production was originally defined in Section 406 of the TAPAA as crude oil "produced from any lease whose average daily production of such substances for the preceding calendar month does not exceed ten barrels per well."[21] The original CLC regulation in November 1973 implementing the exemption defined "stripper well lease" as

> a "property" whose average daily production of crude oil petroleum and petroleum condensates, including natural gas liquids, per well did not exceed 10 barrels per day during the preceding calendar month.

38 Fed. Reg. 32,494, 32,495 (1973); 6 C.F.R. § 150.54 (s)(2). "Property" was in turn defined as

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[20] The summary of the history of the stripper well exemption in the text is recounted in greater detail in *In re DOE Stripper Well Exemption Litigation*, 690 F.2d 1375, 1380-86 (Em.App. 1982). *See also* n. 4, *supra*.

[21] Production at individual wells could exceed ten barrels per day and not undo the exemption so long as production from other wells was sufficiently low so that average production per well did not exceed ten barrels per day.

> the right which arises from a lease in existence in 1972 or from a fee interest to produce domestic crude petroleum in existence in 1972 and is coextensive with that property used in § 150.354(b) [later § 212.72] for purposes of determining "base production control level."

38 Fed. Reg. at 32,495 (1973); 6 C.F.R. § 150.54(s)(2).

The issue before the court is to determine the proper method to account for production from individual stripper well leases which, prior to February 1976, joined with other non-stripper tracts to form an enhanced recovery unit such as the Hawkins Field Unit. The DOE maintains that upon unitization individual stripper well leases lost their exempt status and that the "property" for purposes of applying the stripper well exemption becomes the unit rather than the individual lease. In other words, according to the DOE, the stripper well exemption applies to production from units formed prior to February 1976[22] only if average production per well for the unit as a whole is under ten barrels per day.

Exxon disputes DOE's interpretation and argues that even if a unit BPCL is applied for the purposes of calculating amounts of new and old oil, those particular constituent properties which before unitization qualified as stripper well leases must continue after unitization to enjoy their exempt status.[23] The DOE interpretation,

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[22] In the February 1, 1976 amendments to the regulations, the FEA provided that producers at units formed thereafter could sell at upper-tier prices a volume of crude oil equal to the average volume of stripper well lease production in the twelve months preceding the establishment of a unit BPCL, an amount termed "imputed stripper well oil." 41 Fed.Reg. 4931, 4941 (1976); 10 C.F.R. § 212.75(f) (1977). When Congress mandated the return of stripper well oil to exempt status eight months later, the FEA amended the regulations to allow "imputed stripper well oil" to be free of any price controls. 41 Fed.Reg. 36,172; 36,184 (1976).

[23] Exxon appears at first to argue that the unit property rule cannot be applied at all to any unit containing stripper

says Exxon, is contrary to the plain language and underlying purpose of the several federal statutes providing special treatment to stripper well production, as well as inconsistent with the DOE's own implementing regulations.

In support of its own interpretation, Exxon first points to the language in Section 406 of the TAPAA, reiterated in Section 4(e)(2) of the EPAA, which exempted production "from any *lease* whose average daily production . . . does not exceed ten barrels per well . . . ." (emphasis added). The original implementing regulations defined "stripper well lease" in terms of "property" which was in turn defined as "the right which arises from a *lease in existence in 1972* or from *a fee interest . . . in existence in 1972.*" 38 Fed.Reg. at 32,495 (1973) (emphasis added). The FEA later gave added protection to strippers when it promulgated the "Gypsy Rose Lee Rule." a "once-a-stripper-always-a-stripper" policy under which a stripper well property, once qualified, would always retain its exempt status even if average daily production thereafter exceeded ten barrels. 10 C.F.R. § 210.32; 40 Fed.Reg. 22,123, 22,124 (1975). The intent of Congress, argues Exxon, made explicit in the regulations, was to accord special treatment to stripper well leases, to be preserved through lease-by-lease accounting after unitization, so that production would be maintained at these marginal properties. To allow the stripper well exemption to be swallowed up and lost upon unitization,

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well leases. *See, e.g.*, Def.Mem. at 116 ("[T]o the extent that the DOE's reading of the 'property' regulation in this case requires that a unit be regarded as a single 'property' for purposes of the stripper well lease exemption, it is beyond the agency's statutory authority and is invalid and unenforceable.") In its Reply Memorandum Exxon retreats from this extreme position. *See* Def. Reply at 14.

Exxon contends, would contravene that Congressional intent.[24]

To accept Exxon's interpretation of the stripper well exemption would greatly overstate its reach and would accord it an importance, above all other competing Congressional purposes, far beyond Congress's intent.[25] The limited purpose of the exemption was, as Exxon correctly states, to maintain production at marginal properties, op-

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[24] Exxon also argues that in enacting the EPCA Congress intended that the FEA remove the barriers to unitization which the oil industry had identified as resulting from the unit property rule as set forth in Ruling 1975-15. Among those barriers was the reluctance of stripper well leaseholders to join a unit if doing so would cause their oil to lose its exempt status. *See* n. 8, *supra*. The FEA responded in February 1976 when it created a measure of "imputed stripper well oil" which could be claimed by units formed after that date. *See* n. 22, *supra*. To deny the benefits of the imputed stripper well exemption to units formed before February 1976, says Exxon, contravenes Congressional intent in the EPCA and ECPA because to do so maintains the disincentives faced by stripper well leaseholders asked to join an enhanced recovery unit. The court addresses in greater detail at pp. 836-40, *infra*, the issue of discrimination by the FEA in February 1976 between preexisting and future units. It is enough for the purposes of the present discussion to note that those eager to form a unit could persuade reluctant stripper well leaseholders to join by providing in the unit agreement a formula for the allocation of production to such leaseholders which would recognize the sacrifice they made in joining the unit—in other words, by paying them more. Indeed, even under 10 C.F.R. § 212.75(f), stripper well production is imputed to the unit as a whole, and not to individual leaseholders. *See Francis Oil & Gas Co. v. Exxon Corp.*, 687 F.2d 484, 490 (Em.App. 1982). Allocation of imputed upper-tier or exempt oil within the unit was left to private contract. *Id.*; 41 Fed.Reg. at 4937.

[25] Exxon's heavy reliance on the plain language of the TAPAA and the EPAA, referring to exempt production from stripper well "leases," is undermined by the choice of Congress, in reenacting the exemption in Section 121 of the ECPA, to substitute the word "property" for "lease." *See* 90 Stat. 1132-33 (1976).

eration of which would not otherwise be economically feasible. *See Francis Oil & Gas Co. v. Exxon Corp.*, 687 F.2d 484, 485 (Em.App.1982). Still, Congress recognized the enormous potential for abuse of the exemption and consequently gave the FEA broad powers to make rules to limit such abuse. As the TECA wrote in the leading case interpreting the stripper well exemption, "[t]he exemption benefits to well operators to have their leases declared 'stripper well' was an enormous incentive for manipulation of the exemption. The President and Congress vested with the FEA broad authority to prevent such abuses." *In re DOE Stripper Well Exemption Litigation*, 690 F.2d 1375, 1386 (Em.App.1982). That court quoted extensively from the Conference Report accompanying the TAPAA:

> The Congress intends that the provisions of this section will be strictly enforced and regula[illegible] by the administering agency to insure that the [illegible] exemption of this class of wells for the express purposes described above is not in any way broadened. .... *The Conferees expect the administering agency . . . to provide by regulation safeguards against the manipulation of gerrymandering of lease units in a manner that evades the price control and allocation programs.*
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> *These regulations shall be so designed as to provide safeguards against any abuse, over-reaching or altering of normal patterns of operations to achieve a benefit under this section which would not otherwise be available.* . . . The *sole* purpose and objective of this Section 406 is to keep stripper wells—those producing less than ten barrels per day—in production. .... It is not intended to confer any benefit on the owners and operators of wells producing in excess of ten barrels per day.

Id. at 1387 quoting H.R.Rep. No. 624, 93d Cong., 1st Sess. 30 (1973), (emphasis added), U.S.Code Cong. & Admin.News, p. 2417.

The legislative history of the TAPAA makes unmistakably clear the very narrow scope of the stripper well exemption and the broad authority vested in the FEA to prevent its abuse. To allow individual stripper well leases to keep their exempt status after unitization, after enhanced recovery efforts could shift oil production across lease lines and distort production patterns, would result in "an exemption which would have an impact far in excess of that ever contemplated by Congress." *In re DOE Stripper Well Exemption Litigation, supra,* at 1388. To be sure, a primary concern of Congress expressed in the TAPAA Conference Report was that existing lease lines would be gerrymandered "to average down high production wells with a number of low production stripper wells to remove the high production wells from price ceilings." H.R.Rep. No. 624, 93d Cong., 1st Sess. 30 (1973), U.S.Code Cong. & Admin.News, p. 2532. Congress's underlying purpose of preventing any "altering of normal patterns of operations to achieve a benefit under this section which would not otherwise be available", *id.*, applies equally, however, to shifts of production across lease lines underground after unitization as it does to shifts of the lease lines themselves.[26] Were the FEA to have adopted Exxon's interpretation, it would have ignored its statutory duty "to prevent manipulation of lease units in a manner that evades the price control and allocation programs." *In re DOE Stripper Well Exemption Litigation, supra* at 1381. Application of the unit property rule to the stripper well lease exemption is a proper balancing of Congressional aims, *see Pennzoil Co. v. DOE, supra,* 680 F.2d at 169, and is consistent with "the prevailing view that a unit forms a single property for the purposes of calculating the various regula-

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[26] The possibilities for abuse are illustrated by practices at the Hawkins Field itself, where after unitization average production at a few stripper well leases jumped at times to between 30 and 80 barrels per day, and in one case to 118 barrels per day. PX 309, 310; *see* Pltf.Opp. at 25 n. 21.

tory classifications in the federal petroleum pricing schemes", *Francis Oil & Gas Co. v. Exxon Corp., supra,* 687 F.2d at 488, including the classification of stripper well oil.

2. *The production incentive objective of the two-tier pricing structure*

In several different ways Exxon argues that DOE, in its singleminded pursuit of the objective of controlling prices, ignored or even frustrated Congressional desires to spur increased production. Citing contemporaneous statements by various agency employees, Exxon maintains that the overriding purpose of the two-tier oil pricing structure from its inception in August 1973 pursuant to the ESA, through its successive rebirths pursuant to the EPAA and the EPCA, was to provide incentives to the oil industry to increase domestic crude oil production. The unit property rule, Exxon contends, is arbitrary and capricious, without rational basis, and in excess of statutory authority, because it contravenes Congressional intent in two ways.

First, and in particuar, Exxon claims that the effect of the unit property rule in discouraging unitization is contrary to several of the objectives of the EPAA specifically enumerated by Congress, including protection of public health and national security, preservation of an economically sound and competitive petroleum industry, economic efficiency, and minimization of economic distortion. *See* EPAA § 4(b)(1); 15 U.S.C. § 753(b)(1). Second, and more generally, Exxon maintains that the effect of the unit property rule, in erecting insurmountable barriers to unitization and enhanced recovery projects, defeats the purpose of encouraging increased production. Application of the unit property rule to the Hawkins Field Unit, Exxon asserts, would result in the loss, upon unitization, of virtually all of the new and stripper well oil which was being produced from particular constituent prop-

erties prior to unitization. As the FEA itself recognized, *see* n.8 *supra*, and as Exxon attempts to show by deposition testimony of Hawkins Field interest owners, *see* Def.Mem. at 169-175, prospective unit participants who were producers of new and stripper well oil might be reluctant to join the unit if, when their production was averaged with that of other unit participants, it would lose its exempt or upper-tier status.

The court may strike down the unit property rule only if it is arbitrary or capricious. That standard of review requires this court to uphold the unit property rule "if upon consideration of relevant factors, there was no clear error of judgment and there is a rational basis for the conclusions reached by the administrative body." *Grigsby v. DOE*, 585 F.2d 1069, 1074 (Em.App.1978). Moreover, it is well-settled that deference is due the interpretations of statues and implementing regulations by the agency charged with their enforcement. *Pasco, Inc. v. FEA*, 525 F.2d 1391, 1400 (Em.App.1975). Deference is particularly appropriate when the agency is confronted with the "gargantuan task" of achieving the equitable allocation of crude oil at equitable prices under "recognized emergency conditions." *Id.* at 1394. As the TECA has written in *Consumers Union of the United States, Inc. v. Sawhill*, 525 F.2d 1068 (Em.App.1975):

> "[T]he width of administrative authority must be measured in part by the purposes for which it was conferred." Nowhere could this oft-repeated rubric be more relevant than where Congress acts in a crisis situation. The Emergency Petroleum Allocation Act is Congress' response to precisely such a situation.

Id. at 1077 (citations omitted).[27]

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[27] *See also Pasco, Inc. v. FEA*, 525 F.2d 1391, 1394 n. 6 (Em.App. 1975) ("This phrase ['gargantuan task'] was similarly applied to the burden imposed on the Cost of Living Council under the [Economic] Stabilization Act [of 1970]

Congress knew when it enacted the EPAA that the nine objectives listed therein were not all mutually attainable. In fact, Congress recognized that "in some instances, it may be impossible to satisfy one objective without sacrificing the accomplishment of another." H.R. Rep. No. 628, 93d Cong., 1st Sess. 12 (1973), U.S.Code Cong. & Admin.News, pp. 2582, 2688. Congress directed only that the EPAA objectives be sought "to the maximum extent practicable", 15 U.S.C. § 753(b)(1), indicating the need for the agency to balance competing considerations. *Consumers Union of the United States v. Sawhill, supra*, 525 F.2d at 1073.[28] The most important balance to be struck, Congress recognized, was the "equitable balance between the sometimes conflicting needs of providing adequate inducement for the production of adequate supply of product and of holding down spiraling consumer costs." H.R.Rep. No. 628, 93d Cong., 1st Sess. 26 (1973), U.S. Code Cong. & Admin.News, p. 2703.

The particular balance struck by the agency when it promulgated the unit property rule has already been approved by the TECA in *Pennzoil Co. v. DOE, supra*, 680 F.2d 156 (Em.App.1982). Although the court's express holding was limited to upholding Ruling 1975-15 as a valid interpretation of the property definition in 10 C.F.R. § 212.72, the court made unmistakably clear its conclusion that the regulation itself was consistent with

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which, like the [Emergency Petroleum] Allocation Act, was an extremely broad delegation of authority by Congress to the Executive Branch under recognized emergency conditions.").

[28] When the district court in *Pasco., Inc. v. FEA, supra*, invalidated the FEA's failure to extend a particular exemption to all small refiners, finding that failure contrary to one of the enumerated purposes of the EPAA, the TECA reversed, writing:

"[T]he FEA had at the same time to consider the other eight objectives of Section 406(b)(1), including . . . equitable distribution of crude oil at equitable prices." 525 F.2d at 1397.

Congressional intent as expressed in the underlying statutes.

That result, the court found, was dictated by its prior holding in *Grigsby v. DOE, supra*, 585 F.2d 1069 (Em. App.1979). In *Grigsby* plaintiff operated a unit, consisting of five previously independent tracts, with one unit well. When that unit well began producing excessive salt water, Grigsby drilled a substitute well in 1974 on another of the constituent tracts. Grigsby's treatment of all oil from the substitute well as new oil was challenged by the FEA, which applied the unit property rule to insist that prior production from the first well had to be included in the calculation of a unit BPCL from which amounts of new and old oil production at the second well could be determined. The *Grigsby* court upheld the FEA, stating that "[t]o allow the unit to define the property . . . is consistent with both the language of the definition *and the purposes of the Act.*" *Id.* at 1075 (emphasis added).[29]

The facts in the *Pennzoil* case, involving a field in production in 1972 but which was unitized after 1972 and before February 1976, are more directly on point. On May 1, 1974 the thirty-nine separate tracts of the Walker Creek Field were combined to form a unit and Pennzoil

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[29] Upon rehearing, the court found that under Louisiana law, the original state order compelling unitization of the five properties created a unit only for purposes of production from the reservoir in which the first well had been drilled. 585 F.2d at 1084. Grigsby's second well, although within the contours of the five properties, produced oil from a geologically separate reservoir and therefore created a separate "right to produce" under state law. *Id.* at 1085. As such, the court held Grigsby was permitted to treat all production from the second well as new oil. *Id.* The court's finding in no way detracted, however, from the strength of its earlier holding that the right to produce defined the property for purposes of federal price and control regulations, but merely recognized that the right to produce could arise not only through contractual relations, but also by state law. *See id.* at 1083.

was designated as unit operator. Prior thereto each tract produced separately and had been assigned a separate BPCL. Ten months after unitization Pennzoil began gas injection, but continued nevertheless for another five months, until the issuance of Rule 1975-15, to account for production on a lease-by-lease basis, as it had since the field was unitized. Pennzoil brought suit to challenge the validity of Ruling 1975-15. The TECA held that Ruling 1975-15, which embodied the unit property rule, would, "[e]ven in the absence of our prior decisions . . . be sustainable as a reasonable interpretation. It is consistent with the language of the property definition. *It rationally balanced the objectives of the two-tier pricing structure.*" 680 F.2d at 179 (emphasis added).

Exxon's challenge to the validity of the unit property rule is without merit, fundamentally flawed by the myopia of which it accuses the DOE. Exxon chooses to see only one purpose to the two-tier pricing structure, that of providing production incentives, while ignoring the numerous other objectives which the agency had to consider, including the most fundamental, that of price control. Admittedly, as the agency itself recognized, the unit property rule does create some disincentives to unitization and hence in some measure discourages the extra production which might come from enhanced recovery projects.[30]

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[30] *See* n. 8, *supra*. But Exxon exaggerates the importance of the disincentive created. It argues that holders of leases producing much new or stripper oil would simply refuse to join a unit if doing so would cause their oil production to lose its exempt status. But as discussed in n. 24, *supra*, it would not be a difficult matter for Exxon to devise a formula, to be incorporated in the unit agreement, compensating such reluctant leaseholders for their sacrifice and persuading them to join the unit. To be sure, to the extent the other prospective participants, eager to induce the necessary co-operation of the stripper and new oil producers, would have to pay such producers more, they would in turn earn that much less from the unitization scheme. But to say that the other participants would earn some lesser amount is not to conclude that the

But as the TECA has repeatedly recognized, the DOE was entrusted by Congress with the task of balancing multiple, conflicting objectives. *Pennzoil Co. v. DOE*, *supra*, 680 F.2d at 169. The two-tier price system was set up originally primarily "to halt the inflationary spiral in domestic oil prices." *In re DOE Stripper Well Exemption Litigation*, *supra*, 690 F.2d at 1380. Exxon, in its singleminded emphasis on production incentives, ignores the teaching of the *Pennzoil* court when it wrote that "Pennzoil's reading of the definition would disregard the agency's primary responsibility of balancing objectives and ignore its duty to reasonably inhibit gerrymandering of boundaries undertaken to avoid price controls." 680 F.2d at 169.

In *In re DOE Stripper Well Exemption Litigation*, *supra*, 690 F.2d 1375, the district court invalidated the FEA rule excluding injection wells from the calculation of "average daily production" for the purposes of identifying exempt stripper well properties. The district court found the rule arbitrary and capricious because it was a disincentive to enhanced recovery projects which

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unitization project would necessarily be scuttled. The success of a unitization and enhanced recovery project depends on the amount of additional oil it will yield above what could be produced in the absence of unitization. If the amount of additional oil is sufficiently large, then the present value of the stream of payments to unit participants after unitization could be greater than the present value of the stream payments which would flow to those interest holders from a continuation of pre-unitization, competitive production—even if post-unitization production must be sold at old oil prices and even as adjusted to account for buying off the reluctant stripper and new oil producers. This is not to say that in fact such would be the case at, say, the Hawkins Field. But Exxon's contention that the unit property rule in all cases necessarily presents insuperable obstacles to unitization is incorrect. And any cost which the rule's application adds to the process of unitization are reasonable in light of the agency's obligation to protect against gerrymandering and evasion of price controls.

rely on such injection wells. The TECA reversed. Although the TECA's holding is not directly applicable to Exxon's challenge to the unit rule, the language the court used is particularly telling and bears repeating here. The error of the district court, wrote the TECA, and the error of Exxon here, this court would add, was

> its total reliance on production incentives. It fails to adequately weigh the other side of the coin. Price controls on oil was the fundamental purpose of the legislation. It is obvious that Congress in no way intended to create an opportunity for mass evasion of those controls.

690 F.2d at 1392.

Similarly here, as the TECA has already found, application of the unit property rule requiring that a unit be considered a single property with a single, aggregated BPCL for the purposes of calculating quantities of new, released, stripper and old oil, is a reasonable balancing of competing Congressional purposes which must be upheld by this court.

C. *The February 1976 amendments to the regulations*

Although the *Pennzoil* court clearly upheld the unit property rule of 10 C.F.R. § 212.72, that court expressly declined to consider the effects of later amendments to the oil price regulation on the application of that rule.[31] Effective February 1, 1976, however, the FEA rescinded Ruling 1975-15 *ab initio*, and declared that operators of units formed both before and after that date need not

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[31] After discussing the rescission of Ruling 1975-15 by the agency in February 1976, and the announcement of the "significant alterations in producing patterns" test, the TECA in *Pennzoil* concluded: "There is not now before us any issue concerning the application of this subsequent rulemaking and we refrain from expressing any opinion concerning it other than that it does not militate against our disposition of the issues presented to us on this appeal." 680 F.2d at 164 n. 13.

calculate a unit BPCL until there occurred a "significant alteration in producing patterns." Moreover, units formed after February 1, 1976 could benefit from the newly-created Section 212.75, providing for a more liberal unit BPCL rule, imputed stripper well oil, and, as of September 1, 1976, imputed new oil.

The DOE contends that the Hawkins Field Unit has always been subject to the strict requirements of Section 212.72 alone, namely, that a unit BPCL be established as of the date of unitization. DOE maintains that the rescission of Ruling 1975-15 as to pre-existing units was only a relaxation of enforcement policy, and that with respect to such units the "significant alteration" test serves only as guidance in compliance audits. *See* Ruling 1977-2, 42 Fed.Reg. 4409, 4415 (1977). Exxon argues that the "significant alterations in producing patterns" test constituted an entirely new regulation, not applicable before September 1, 1976, the effective date of the formal definition of the term. Any attempt to apply it before that date, says Exxon, would constitute unlawful retroactive rulemaking. Exxon further asserts that to deny to pre-existing units the benefits of Section 212.75 given to units formed after February 1, 1976 is arbitrary and capricious discrimination.

1. *Retroactivity*

The DOE's attempt to characterize its rescission of Ruling 1975-15 as a mere relaxation in enforcement policy cannot withstand scrutiny. The agency's pronouncements in February 1976 amounted to a completely new, although less strict, interpretation of the property definition in Section 212.72.

That definition of "property" as "the right to produce domestic crude oil from a lease or from a fee interest" had generated some confusion as to its proper application to unitized properties. The FEA eliminated that confusion when, in Ruling 1975-15, it made explicit what was

implicit in the regulation itself—the requirement that a unit be treated as a single property. In that Ruling, the FEA stated:

> [T]he need for comparison of like quantities requires the producer in computing the BPCL to measure and total the individual 1972 monthly production levels for each of the leases that now comprise the unit.

40 Fed.Reg. 40,832 (1975).

Only five months later, however, the agency, in equally clear terms, rescinded that interpretation *ab initio*. In the preamble to the February 1976 amendments, the agency explained:

> Ruling 1975-15 is rescinded *ab initio* insofar as it requires producers of unitized properties to total all of the BPCL's of the participating leases and to treat the unit as a single property, before such time as there has been a significant alteration in pre-unitized producing patterns of the individual leases.

41 Fed.Reg. at 4937. Nowhere in the preamble is there any hint that the agency intended the rescission of the strict unit property rule embodied in Ruling 1975-15 to be merely a relaxation of enforcement policy as applied to pre-existing units. Indeed, when the agency intended such a discriminatory result, it stated its aim clearly. For example, it established the special unit BPCL rule of Section 212.75 "[f]or units established later in 1976, or thereafter." 41 Fed.Reg. at 4938 (1976). However, it rescinded Ruling 1975-15 not prospectively alone, but *ab initio*. In other words, it was as if that interpretation had never existed.

To conclude, however, that the significant alterations test, finally defined effective September 1, 1976, constituted a new interpretation of Section 212.72 does not preclude its application before that date. The fundamental criterion for determining whether a statute, regu-

lation or interpretation may be applied retroactively is one of reasonableness. *Pennzoil Co. v. DOE*, *supra*, 680 F.2d at 175. Generally speaking, " 'retroactive rules are valid if they are reasonable, but are invalid if their retroactivity is unreasonable in the circumstances.' " *Id.*, quoting 2 K. Davis, *Administrative Law Treatise* § 7.23, at 109 (2d ed. 1979). The court must weigh the mischief which might follow if the rule is denied retroactive effect, thereby producing a result contrary to statutory design or legal and equitable principles, against the ill effect of retroactive application of the new rule. *Pennzoil Co. v. DOE*, *supra*, 680 F.2d at 175. Among the factors weighing in the balance are the extent to which a party has relied on previously settled law and the burden which the retroactive rule would impose on a party. *Id.*

Brief reflection on the factors cited reveals the fatal flaw of Exxon's argument that the significant alterations test cannot be applied retroactively. Courts need concern themselves with possible injury to a party, and might hesitate to apply a rule retroactively, only if the new rule is stricter than the standard on which the party relied in the past. Exxon, however, suffered no injury from retroactive application of the new interpretation, because the significant alterations test was less stringent than the rule it replaced. Under Ruling 1975-15, the unit property rule required that a unit BPCL be established as of the legally effective date of the unitization agreement. The new interpretation, adopted in February 1976, allowed a producer to postpone establishing a unit BPCL and to continue lease-by-lease accounting until production patterns had been significantly altered, perhaps months or even years later. In *Pennzoil Co. v. DOE*, *supra*, the TECA found that retroactive application of Ruling 1975-15 involved no unfairness because it simply clarified uncertain law, making explicit what was implicit in the underlying property regulation. 680 F.2d at 176. If the retroactive application of that strict requirement, that a unit BPCL be calculated as of the date of unitiza-

tion, involved no unfairness, then surely the retroactive relaxation of that standard cannot be unfair.

2. *Discrimination between units formed before and after February 1, 1976*

Exxon argues that, fairly read, Section 212.75, including its beneficial provisions for a special unit BPCL rule and imputed stripper well and new oil, applies generally to all units regardless of the date on which they were formed.[32] In the alternative, Exxon argues that DOE's denial of the benefits of Section 212.75 to units formed before February 1, 1976 arbitrarily discriminates between similarly situated parties without explanation.

Exxon's first argument is mistaken. Exxon apparently would like this court to interpret the regulations to conform with Exxon's practices: that Section 212.75 applies in its entirety to all units, including pre-existing units such as the Hawkins Field Unit, but it applies only after September 1, 1976. That, of course, is not what the agency intended. As the FEA spelled out in the preamble to the February 1976 amendments, describing Section 212.75, "[f]or units established *later in 1976 or thereafter* . . . a special rule for unitized properties was proposed for comment and is adopted today." 41 Fed. Reg. at 4938. In the same preamble the agency spoke of

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[32] At units formed after February 1, 1976 producers could calculate the unit BPCL based on average production not in 1975 or 1972 but in the twelve months preceding the date on which enhanced recovery operations began or a significant alteration in producing patterns occured. Producers at new units could also sell at upper-tier prices "imputed stripper well oil" and, as of September 1, 1976, "imputed new oil", both calculated on the basis of the average volume of such production from the properties comprising the unit during the same twelve months. Existing units, on the other hand, received lesser incentives, including the revised 1975 BPCL base period, the elimination of cumulative deficiencies, and the retroactive rescission of Ruling 1975-15. *See* discussion at pp. 820-21, *supra*, and citations therein.

problems faced by a "*potential* unit", *id.*, and of eliminating "any significant disincentive to the *prospective* unitization of properties." *Id.* (emphasis added). The TECA in *Pennzoil* recognized the solely prospective character of Section 212.75 when it described its "special provisions *for units formed after the effective date of the regulations*, including definitions of a unit and a unit BPCL, new rules concerning stripper well production and imputed crude oil." 680 F.2d at 164 n. 13 (emphasis added). Exxon itself properly understood Section 212.75 at the time it was issued to apply only to units formed after February 1, 1976. In its comments to the proposed rule which would become Section 212.75, Exxon wrote:

> Although most disincentives for units formed after February 1, 1976 have been removed by the new regulations, it is still necessary to remove the penalties and disincentives imposed by Ruling 1975-15 examples on units formed between 1973 and January 31, 1976 in order to ensure that these units are maintained in existence. These disincentives [to] past units could be removed by an addition to the proposed new regulations. This addition would apply to units formed from January 1, 1973 to January 31, 1976 and would make available to them the same measure of relief that the regulation provides for units formed on or after February 1, 1976.

PX 188, Appendix 11 at 2-3.

In sum, as the agency made clear and as Exxon understood, Section 212.75 applied prospectively only. The issue before the court, therefore, is not whether the court will heed Exxon's plea to rewrite Section 212.75, but whether that rule, with its avowed discriminatory effect of providing certain incentives for the creation of new units, while denying those benefits to existing units, should be struck down.[33]

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[33] According to Ruling 1977-2, 42 Fed.Reg. 4409 (1977), after the February 1976 amendments to the regulations were

issued two elements determined the required manner of accounting for oil production at units: the date on which the unit was formed and, more important, the date on which enhanced recovery operations began or a significant alteration in producing patterns occurred.

Although Ruling 1977-2 is not a model of clarity, three categories of units may be distilled from it. The first category consisted of all units formed before February 1, 1976, and at which enhanced recovery operations or a significant alteration in producing patterns occurred before September 1, 1976. At units in the first category a unit BPCL had to be established as of the date the significant alteration in producing patterns occurred. Only Section 212.72 applied to these units. 42 Fed.Reg. at 4415.

The second category consisted of all units, whenever formed, at which a significant alteration in producing patterns occurred only after August 31, 1976. At units in this second category, as well, a unit BPCL had to be established as of the date the significant alteration in producing patterns occurred, but such units enjoyed all the benefits of Section 212.75. *Id.*; *see* n. 35, *infra*.

The third category consisted of units formed between February 1, 1976 and August 31, 1976 and at which either enhanced recovery operations began, or a significant alteration in producing patterns occurred, prior to September 1, 1976. The agency defined "enhanced recovery" in February 1976 to include gas or liquid injection operations. 41 Fed.Reg. at 4941. The definition of significant alteration in producing patterns, which came only as of September 1, 1976, swallowed up the concept of enhanced recovery, because the new definition included "the application of extraneous energy sources by the injection of liquids or gases into the reservoir." 41 Fed.Reg. at 36,184. The agency recognized, however, that producing patterns might be altered before gas injection, and so added as an alternative definition of significant alteration "the increase of production allowables for any property that constitutes the unitized property." *Id.*

Because operators of units in this third category, formed after February 1, 1976, knew the definition of enhanced recovery when their units were formed, whereas "significant alteration" was defined only in September, the agency chose to apply the two concepts differently. Operators of units at which enhanced recovery operations began before September 1, 1976 were required to establish a unit BPCL as of the date

As the court has already noted,[34] deference is due the FEA as "the agency entrusted by Congress to balance multiple objectives in the administration of relevant statutes," *Pennzoil Co. v. DOE*, *supra*, 680 F.2d at 169, and its rules must be upheld unless they are arbitrary or

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such operations began. 42 Fed.Reg. at 4915. But operators of units at which no enhanced recovery operations began, but where a significant alteration in producing patterns occurred, before September 1, 1976, were allowed to wait until September 1, 1976 to establish a unit BPCL. *Id.*

As a practical matter this meant that if an operator began gas or liquid injection—which would constitute both enhanced recovery and a significant alteration—the operator had to establish a unit BPCL as of that date. If there occurred only a shift in production allowables—which would constitute a significant alteration but not enhanced recovery—the operator could wait until September 1, 1976 to establish a unit BPCL.

Both kinds of units within this third category benefitted only from those provisions of Section 212.75 in effect at the time the enhanced recovery project began or the significant alteration occurred. *Id.* In other words, such units were not allowed any measure of imputed new oil, but they were allowed to use the special unit BPCL rule and the provisions for imputed stripper well oil.

In connection with its argument against retroactive application to it of the significant alterations test, Exxon complains that the FEA unlawfully discriminated by requiring operators of units formed after February 1, 1976 to establish a unit BPCL no earlier than September 1, 1976, even if a significant alteration in producing patterns occurred before that date. But the Hawkins Field Unit, under a legal obligation to establish a unit BPCL as of the date of its formation on January 1, 1975, was not similarly situated to a unit formed at a time, between February and September 1976, when the agency had expressly reserved for further comment and study the definition of the legal standard by which the obligation to calculate a unit BPCL would be established. *See* 41 Fed. Reg. at 4937. On the contrary, the agency's decision to admit this small measure of relief to those who, when they formed their units, had acted with a view to the still nebulous standard, was eminently fair.

[34] *See* discussion at pp. 832-33, *supra*.

capricious. The FEA promulgated the February 1976 amendments to the oil price regulation, including Section 212.75, pursuant to the direction of Congress in the EPCA that it amend the regulation to provide incentives for increased domestic crude oil production while at the same time maintaining firm control of crude oil prices. EPCA § 401(a). Although Congress explicitly mandated measures to spur domestic production, it underscored its concern with price control by directing that the agency could allow no increase in the price of old oil above the existing ceiling unless it expressly found that the increase would encourage enhanced recovery projects and would likely result in production greater than would have otherwise occurred. EPCA § 401(a), 15 U.S.C. § 757(b)(2); *see also* n. 9, *supra*.

Working within the narrow constraints imposed by Congress, the FEA reasonably balanced the competing aims of increased production and price control by extending the most favorable incentives to new units.[35] Indeed,

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[35] To say that the agency extended the benefits of Section 212.75 to new units alone is imprecise. Units which, like the Hawkins Field Unit, were formed before February 1976, but at which, unlike the Hawkins Field Unit (see pp. 842-45, *infra*) a significant alteration in producing patterns occurred only after September 1, 1976, also could benefit from the favorable provisions of Section 212.75. *See* n. 33, *supra*. The FEA, explaining in Ruling 1977-2 the application of the significant alterations test to pre-existing units, wrote:

> All such units formed during or after 1972 were required to calculate a BPCL by aggregating the BPCL's of all the participating properties at such time as significant changes in the units' producing patterns occurred . . . . If no such alteration has occurred as of September 1, 1976, determinations of uppertier and stripper well crude oil volumes may continue to be made on a lease by lease basis until such time as a significant alteration does occur, at which time the unitized property must be treated as a single property and a unit BPCL must be established.

the FEA could not have treated all units alike, whenever formed. Had the FEA allowed all units, including the Hawkins Field, to benefit from the favorable provisions of Section 212.75, it would have violated the EPCA directive that no old oil be reclassified as higher-price oil unless it would not have otherwise been produced.[36] The owners of the properties comprising pre-existing units such as the Hawkins Field Unit made their economic decision to unitize and to pursue enhanced recovery efforts long before February 1976. Any further inducement to them would have produced no additional oil that they had not already decided was worth producing. They could not be encouraged to do what they had already done. As

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As of the time that a unit BPCL is established, the provision of § 212.75 then in effect are applicable.

41 Fed.Reg. at 4415 (emphasis added).

The agency articulated no reasons for acting so generously towards such units when its stated purpose was only to encourage prospective unitization. *See* discussion at p. ——, *supra*. One might speculate that because such units had not yet undergone a significant alteration in producing patterns, they faced a greater risk of dissolution than did units where significant and perhaps irreversible alterations had already occurred. The agency may have wished to provide particular incentives for the maintenance of such units by holding out the prospect of greater rewards. But whatever the agency's reasons, the issue of the reasonableness of extending the benefits of Section 212.75 to some units formed before February 1976 is not before the court. Even if it were, the court could at most strike down that small portion of Section 212.75 as an unjustifiable windfall to pre-existing units. That decision would not affect the validity of the agency's decision to provide incentives for the creation of new units while denying those incentives to pre-existing units like the Hawkins Field Unit.

[36] On the other hand, had the FEA continued to treat all units as required by Ruling 1975-15, it would have violated Congress's intent to provide further incentives for increased domestic oil production—in particular, to spur unitization and enhanced recovery projects.

Exxon admits, "of course, since pre-February 1976 units had already been established when the imputed new and imputed stripper lease rules were promulgated, *the new rules could have no incentive effect on the formation of these projects.*" Def.Mem. at 137 (emphasis added).

Exxon complains, however, that the benefits of Section 212.75 should have been provided to pre-existing units as well in order to prevent their dissolution. But Exxon here seeks to wage the battle it lost when Section 212.75 was promulgated. In its comments to the proposed rule, Exxon conceded that proposed Section 212.75 removed most disincentives to prospective unitization, but urged that its reach be broadened to include units formed before February 1976 "to ensure that these units are maintained in existence." PX 188, Appendix 11 at 2. The agency did in fact show its concern with the maintenance of existing units when, in its notice of proposed rulemaking, it "request[ed] comments on the extent to which the establishment of a more recent BPCL will operate to maintain units in existence which were formed between 1973 and 1976." 41 Fed.Reg. at 1571. But the agency concluded, after review of the comments, that the limited incentives it provided to pre-existing units were sufficient. The extension of the revised 1975 BPCL to existing units, combined with the retroactive recission of Ruling 1975-15, "eliminate[d] the most significant disincentives that producers had faced under the prior regulations." 41 Fed.Reg. at 4938 (1976). In refusing to go further and to extend greater benefits to pre-existing units the agency performed precisely the delicate weighing of competing statutory objectives with which Congress had entrusted it and to which judicial deference is due. Indeed, the agency could not have extended all the benefits of Section 212.75 to pre-existing units without violating the directives of the EPCA.[37] Discriminatory

[37] The FEA's sliding scale of incentives, though complex, reasonably carried out the conflicting objectives of the EPCA. The FEA offered strong incentives—a special unit BPCL rule

treatment by the FEA of prospective and existing units was therefore not arbitrary or capricious; on the contrary, it was a reasonable balancing of the conflicting policy objectives of incresed crude oil production and price control.

D. *Significant alteration in producing patterns*

Effective September 1, 1976 the FEA defined "significant alteration in producing patterns" as "the occurrence of either (1) the application of extraneous energy sources by the injection of liquids or gases into the reservoir, or (2) the increase of production allowables for any property that constitutes the unitized property." 41 Fed.Reg. 36,172; 36,184 (1976). DOE contends that on the peculiar facts of this case, the significant alterations test affords Exxon no relief from the strict unit property rule of Ruling 1975-15, because there was both an increase in production allowables at constituent leases and gas injection at the Hawkins Field on January 1, 1975, the day the field was unitized. Exxon counters that the question of whether any alteration of producing patterns was "significant" is a question of fact, requiring expert testimony by petroleum engineers, which the court may not resolve on summary judgment. In any event, continues Exxon, no significant alteration occurred at the Hawkins Field before March 1977, when the inert gas plant began operation. In fact, according to Exxon, no truly significant alteration occurred until the injection of inert gas stabilized reversoir pressure

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and provisions for imputed stripper well oil—to those considering unitization in February 1976. It added yet another incentive—imputed new oil—seven months later, for those still hesitant to unitize. It offered the least relief—a 1975 BPCL base period and the retroactive rescission of Ruling 1975-15 to those units least in need, those formed before February 1976 and unlikely to dissolve given the participants' substantial stake in them as evidenced by a significant alteration in producing patterns having already taken place.

and altered the reservoir's underground drive mechanisms, sometime in 1979.

In effect, Exxon condemns the definition of significant alteration as too harsh and inflexible and again invites the court to rewrite the regulation in Exxon's favor. But again Exxon miscasts the issue. Although the court may reasonably interpret any ambiguity which might arise from application of the regulation, the court is without power to substitute its own or Exxon's ideas as to how the agency should have defined significant alteration in producing patterns. At most, the court could invalidate the rule if it were fatally inconsistent with applicable statutes.

But it is not. Rather than rely on hard to decipher underground phenomena, the agency based its definition on events readily observable by agency auditors. This clear, easily administered test was not only consistent with, but was required by, applicable statutes. In the EPCA the Congress directed the FEA, in drafting the February 1976 amendments, to establish standards that, while balancing the goals of price control and production incentives, would be readily enforceable. Congress required the agency to determine that the classifications of oil it would establish were "administratively feasible." EPCA § 401(a); 15 U.S.C. § 757(b)(1)(A). The term "administratively feasible", according to the Conference Committee, meant "a workable pricing program which is both fully enforceable under section 5 and compatible with achieving the policy objectives set forth in Section 4(b)(1) of the Emergency Petroleum Allocation Act." S.Rep. No. 516, 94th Cong., 1st Sess. 191 (1975), U.S. Code Cong. & Admin.News, p. 2033.

The comments the agency considered when it devised the significant alteration test "indicated the difficulty associated with attempting to develop a workable standard for determining the point at which production patterns have been significantly altered." 41 Fed.Reg. at

36,181. Proposals ranged broadly, including requiring a unit BPCL as of the date of unitization, allowing producers the option to continue lease-by-lease accounting until injection occurred, allowing the option for two years, or finally, allowing the option indefinitely. *Id.* The definition the agency finally settled on was designed to enable the agency adequately to police the oil industry to ensure effective price control, while at the same time affording "maximum flexibility to producers seeking to form and maintain unitized properties," *id.* at 36,182, in order to remove the disincentives to unitization targeted by the EPCA.

Agency emphasis upon administrable standards, demanded by Congress, has consistently been upheld by the TECA. For example, in *Sauder v. DOE*, *supra*, 648 F.2d 1341, Congress directed the FEA, in drafting the stripper well exemption, to provide appropriate limitations to the definition of the exempt stripper lease "to insure that an administratively workable system is established which does not permit abuse." *Id.* at 1346, quoting H.R.Rep. No. 624, 93d Cong., 1st Sess. 31 (1973), U.S.Code Cong. & Admin.News, p. 2533; *see also In re DOE Stripper Well Exemption Litigation*, *supra*, 690 F.2d at 1387. Without a formal unitization agreement, Sauder and five other working interest owners cooperatively produced oil from three separate properties overlaying a single reservoir. Alleging a *de facto* unitization, Sauder claimed the stripper well exemption for production from all three properties. Treating the properties separately, the DOE disallowed the claim for two of the three. The court upheld the agency's insistence on a formal unitization agreement as "consistent with Congress' direction that the agency devise 'an administratively workable system' that avoids abuse of the exemption, and does not exceed the agency's authority." 648 F.2d at 1346. The court explained: "Equitable pricing is one of the important objectives of the EPAA, 'and this objective cannot be bogged

down in an administrative quagmire.'" *Id.* at 1348, quoting *Tenneco Oil Co. v. Federal Power Commission*, 442 F.2d 489, 497 (5th Cir.1971).

Similarly here, the agency's decision to define significant alteration in producing patterns in terms of easily observable events is consistent with the intent of Congress that administration of price controls be workable and effective. The FEA with its limited resources could not afford to satisfy Exxon's desire that the agency send droves of petroleum engineers to the Hawkins Field to conduct elaborate tests to examine the field's underground drive mechanism. That is precisely the "quagmire" that the agency had to avoid. The agency described its limitations in another context, when it explained its initial rejection of the proposal that separate reservoirs underlying a single tract be treated as separate "properties" for purposes of accounting for upper and lower-tier oil production.

> [T]he January 8 proposal was not adopted primarily because FEA concluded that it would be infeasible to attempt to administer a program under which FEA could not require easily understandable records from which could be determined the limits of each producing property. FEA has neither the expertise nor the resources required to monitor reservoir-by-reservoir production, and FEA auditors would not have at their disposal adequate means to confirm or deny that production had in fact resulted from two or more separate and distinct producing reservoirs.

41 Fed.Reg. at 36,179. Neither did the FEA have the expertise or resources to judge significant alterations in producing patterns of unitized properties on any basis other than easily observable events.

Even Exxon recognized the value of ease of administration. Commenting on the above-mentioned proposal

that separate reservoirs be considered separate properties, Exxon wrote: "We recognize the need for FEA to develop regulations that can be audited." PX 217 at 6. More to the point, Exxon recognized the need for agency standards based on objective criteria, and not dependent for their enforcement on extensive subjective evaluation. A proposal to limit certain incentives to "bona fide" enhanced recovery units met the rebuke from Exxon that "once a definition is developed, it will present severe administrative problems in certifying and auditing upper-tier production. These problems would make the system very difficult and expensive to administer on the part of both FEA and producing companies." PX 188, Appendix 3 at 2. Complaining that "[t]here is considerable evidence that the current regulations in total are not administratively workable," Exxon suggested that "[r]egulations should rely on precise definitions rather than on a requirement for administrative judgment." *Id.*, Appendix 2 at 1.

Indeed, although Exxon now invites the court to substitute just such a subjective test based on administrative judgment, Exxon obviously understood the standard as the agency intended when the test was announced, because Exxon calculated a unit BPCL at the Hawkins Field beginning September 1, 1976—long before the changes in underground pressure or drive mechanism Exxon would like this court to rely on. As Exxon attorney Fred File then concluded unequivocally: "Inasmuch as the Hawkins unit cannot meet the new tests permitting tract-by-tract computations, it is clear that after September 1, 1976 tract-by-tract computations will no longer be permitted. . . . It is clear that the new regulations require computation of upper and lower tier oil at Hawkins on a unit basis after September 1, 1976." PX 236 at 3, 4 (Memorandum from Fred W. File to Fred M. Perkins, October 1, 1976).

Ironically, in drafting the definition of significant alteration in producing patterns, the FEA heeded Exxon's

advice that it rely on precise definitions rather than administrative judgment. One might speculate about other standards, not substantially harder to administer, whose effect would have been to allow greater relief to the Hawkins Field, where interim gas injection, transfer of production allowables and unitization happened to coincide.[38] But "[t]o be upheld, the action taken by the FEA

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[38] In Ruling 1977-2, the FEA said it would, "on a case by case basis, permit unit operators to justify the establishment of the date of significant alteration in producing patterns in [pre-existing] units on reasonable bases other than those specified by the present definition." 41 Fed.Reg. at 4415. But Exxon has never proffered any alternative basis to the agency, contending instead that the agency's purported relaxation of enforcement policy is invalid and that only Section 212.75 applies to it. Consequently, the question of what might be a reasonable alternative basis to justify the establishment of the date of significant alteration is not before the court. However, Exxon's suggestion to this court that a significant alteration be determined on the basis of changes in the field's underground drive mechanism is not such a reasonable alternative basis. Even case by case determinations must be workable, and doubtless few petroleum engineers would agree on the amorphous "significance" of voluminous data on geological transformations. For the same reason, it would serve no purpose for this court to hear the "expert" testimony Exxon would offer. As Exxon itself vigorously asserts, "significant alteration" was not a term of art in the oil industry, but was, in Exxon's words, "cut from whole cloth" by the agency. *See* Def.Mem. at 61-62. Accordingly, it would be futile for the court to hear petroleum engineers testify as to a legal conclusion they have no expertise to make: what alterations in producing patterns were "significant."

Exxon's argument that a trial is necessary to resolve conflicting factual contentions as to when a significant alteration in producing patterns occurred is mistaken. As the TECA wrote in *Grigsby v. DOE, supra*, 585 F.2d at 1079, " '[t]o preclude summary judgment the disputed facts must be material and must affect the outcome of the litigation.' " Grigsby had argued that he should be allowed to establish that his second well had been drilled on a different lease within the unit. *See* p. 833, *supra*. The TECA found that fact immaterial, because Grigsby's unitized property had to be treated

need not be the same as the court or the appellee might have taken in correcting the problems occurring as a result of the energy crisis and the impact of earlier regulations, so long as the action taken is reasonable." *Pasco v. FEA*, *supra*, 525 F.2d at 1400. Gas injection and transfer of production allowables among constituent properties are events commonly associated with shifts in oil production across lease lines. To allow lease-by-lease accounting to continue after such shifts would have enabled unit operators to circumvent oil price controls. To require the agency to adopt a subjective test based on complex geological phenomena would have plunged the agency into an administrative quagmire which would have had the same result. The agency definition of significant alteration was a reasonable effort by the agency to fulfill its "duty to reasonably inhibit gerrymandering of boundaries undertaken to avoid price controls." *Pennzoil Co. v. DOE*, *supra*, 680 F.2d at 169. Accordingly, it must be upheld.[39]

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as one property even if the second well had been drilled on a different lease within the unit. 585 F.2d at 1079 n. 17. In the same manner, Exxon's insistence that it be allowed to establish that the Hawkins Field underground drive mechanism was not altered until sometime in 1979 is irrelevant. As a matter of law, a significant alteration occurred when there was either a transfer of production allowables among leases within the unit or gas injection, regardless of when the field's drive mechanism was transformed. Accordingly, there exists no genuine dispute as to issues of material fact and summary judgment is appropriate.

[39] Exxon's barrage of attacks on the agency's amendments to the regulations in February and September 1976—decrying their retroactive application, their discriminatory effect, and the rigor of their standards—is puzzling. If the court were to uphold Exxon's challenges, at most the court could invalidate all or part of Section 212.75 and the significant alterations test as applied to pre-existing units. But that would not leave a vacuum. Instead, there would remain to apply to the Hawkins Field Unit only Section 212.72, unembellished by either Ruling 1975-15 (rescinded *ab initio*) or by the significant alterations test. But the TECA has held in the *Pennzoil*

It was clear to Exxon as of September 1, 1976 that the producing patterns at the Hawkins Field had been significantly altered because it was clear as of that date that Exxon had transferred production allowables among constituent leases and that it was injecting gas.[40] And both had in fact occurred on the day the Hawkins Field became a unit, on January 1, 1975.

Prior to unitization the Texas Railroad Commission ("TRRC") limited the number of barrels of oil—called production "allowables"—each well within the Hawkins Field could produce. When a producer shut in an unproductive well, under TRRC orders that well's allowables were transferred pro rata among all the other wells in the field. In its order approving the unitization of the Hawkins Field, the TRRC granted the field a unit allowable and in doing so relinquished to Exxon the control of allocating production among the properties comprising the unit. DX Intro 2. The unit allowable permitted Exxon to transfer production from lease to lease at will, without regard to prior limits on produc-

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case that implicit in the property regulation itself is the unit property rule, the requirement that a unit BPCL be calculated as of the date of unitization. 680 F.2d at 176. Consequently, if Exxon's attacks were to succeed, it would still find itself in the position it is trying to escape. Exxon apparently seeks the best of all possible worlds. It would like the court to uphold the rescission of Ruling 1975-15 and to rewrite the rule which replaced it to suit Exxon's practices at the Hawkins Field, in effect leaving it free of any rule at all. The 1976 amendments to the oil price regulations cannot reasonably be read that way.

[40] Exxon in fact understood the regulation to require unit-wide accounting much earlier. Interpreting the September 1976 amendments to the regulations, including the definition of significant alteration, one Exxon manager wrote: "This exception is of no benefit to Hawkins because of the transfer of allowables provisions. It appears that this regulation will require that Hawkins begin unit calculations on February 1, 1975." PX 231 at 5. (Memorandum from H.T. Wright to S.W. Abel, August 23, 1976).

tion at any lease, provided total unit production did not exceed the unit allowable. In effect, therefore, the TRRC accorded Exxon as of January 1, 1975 an increase in production allowables for any property within the Hawkins Field Unit to which Exxon chose to transfer production, and thereby triggered a significant alteration in producing patterns as of January 1, 1975.

Exxon did not wait to take advantage of its new-found freedom as unit operator. In January 1975 Exxon boosted production above prior allowables by almost 320,000 barrels at 65 leases—roughly 10 percent of total unit production at one-quarter of the unit's properties. *See* Plaintiff's Appendix of Charts and Graphs, C-1a. At the same time, production declined by almost an equal amount at 137 other leases. *Id.* at C-1b. Production shifts of increasing magnitude continued throughout the early months of 1975.[41] By shifting production within the unit at will, with only an eye to the unit allowable limit, Exxon effectively "transfer[red] production allowables among participating leases." *See* 41 Fed.Reg. at 36,182.[42]

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[41] The figures concerning transfer of production allowables among constituent properties in the first five months of 1975 appear below. *See* Plaintiff's Appendix of Charts and Graphs, C.

Month (1975)	Number of leases at which production increased above prior allowable	Increase in production (barrels)	Number of leases at which production decreased	Decrease in production (barrels)
Jan.	65	319,654	137	294,536
Feb.	56	316,027	145	320,711
March	51	442,878	150	417,553
April	45	441,548	153	446,447
May	53	546,959	148	540,503

[42] Exxon's own measurements and analysis of production shifts at the Hawkins Field show the dramatic changes that occurred in 1975. Studying the question only days after the

Meanwhile, after unitization Exxon continued—and increased—the injections of natural gas it had begun in 1970. Even if Exxon had only continued to inject natural gas at the rate it had done so before unitization—or even some lesser rate—it would have engaged in "the application of extraneous energy sources by the injection of liquids or gases into the reservoir"—itself a significant alteration in producing patterns. 41 Fed.Reg. at 36,184.[43] But Exxon in fact substantially increased gas injection after unitization. In its 1969 approval of Exxon's interim

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February 1976 amendments were issued, Exxon engineer L.D. Carlson concluded that almost 20 percent of 1975 production had shifted across lease lines, almost two and one-half times as much as had shifted in either 1974 or 1973. PX 200 (February 6, 1976).

Two other Exxon engineers were assigned the task in mid-1975 to determine why volumes of "Phase IV" or new oil at the Hawkins Field had exceeded earlier forecasts. They concluded that, of the excess, "[a]pproximately 21.2 MB/D is due to *the redistribution of production on Exxon-operated leases.* Formation of the unit has enabled us to reduce production from those leases with high gas-oil or water-oil ratios. *This results in increased production from those leases in the flush part of the field and correspondingly their Phase IV volumes.*" PX 126 at 1 (Report by L.D. Roeder and J.B. Holmes, June 20, 1975) (emphasis added).

[43] Exxon argues that its re-injection into the Hawkins Field of natural gas taken from the field was outside the definition because the gas was not an "extraneous" energy source. *See* Def.Opp. at 182-83. The FEA made clear, however, the preamble to the February 1976 amendments, that "extraneous" included gas recycled from the reservoir itself. The agency explained:

> In response to the proposed definition, many comments expressed concern that the language "from extraneous sources" might preclude some types of enhanced recovery projects that recycle reservoir gas . . . . The fact that the injected fluids or gases may have originated in the reservoir is irrelevant as long as they are injected by an extraneous energy source.

41 Fed.Reg. at 4938.

plan, the TRRC authorized the injection of an average of 20 million cubic feet of natural gas per day. But when it approved the unitization of the Hawkins Field, the TRRC removed that limit. Accordingly, Exxon injected 28.2 mcf per day in January 1975—40 percent more than a year earlier. PX 177. Indeed, Exxon increased injections thereafter until by the fall of 1975 it was injecting more than twice as much gas as a year before. *Id.* Over all, in the first ten months of 1975 Exxon injected an average 36.5 mcf per day—almost an eighty percent increase over the same period in 1974. *Id.* Comparing totals for the years 1972 through 1975 reveals the same clear jump after unitization. Although between 1972 and 1975 increases averaged only 5 percent annually, total gas injections at the Hawkins Field in 1975 leaped 82 percent, from 7,652,916 mcf in 1974 to 13,945,000 mcf in 1975, with the 1975 total more than double the amount for 1972. *See* PX 210 at 2, 5; PX 109 at 2.[44]

Accordingly, under either prong of the regulatory definition—an increase in production allowables at any constituent property, or gas injection—a significant alteration in producing patterns occurred at the Hawkins Field on January 1, 1975, and on that date Exxon's obligation to calculate a unit BPCL and to account for oil production at the Hawkins Field on a unit-wide basis accrued.

III. *Estoppel*

Exxon argues that the government is estopped from now challenging the legality of Exxon's lease-by-lease ac-

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[44] Total annual gas injections at the Hawkins Field from 1972 to 1975 were as follows:

Year	Total (mcf)
1975	13,945,000
1974	7,652,916
1973	7,229,119
1972	6,897,093

See PX 210 at 2, 5; PX 109 at 2.

counting practices at the Hawkins Field Unit. According to Exxon, the decision by it and the other Hawkins Field interest owners to unitize, as well as the decision to establish and maintain the practice of accounting for new and old oil production on an individual lease basis, were both made in reasonable reliance on repeated agency assurances to Exxon and others that such practices were allowable under the regulations. DOE replies that as a matter of law the government may never be estopped on the basis of unauthorized statements by government officials. In any event, DOE continues, Exxon cannot prove reasonable reliance, an essential element of the estoppel defense.

Exxon's estoppel defense must fail because the undisputed facts in this case demonstrate that Exxon's reliance, if any, on unauthorized informal statements by agency employees, was not reasonable. To begin with, Exxon can point to no agency pronouncement prior to January 1, 1975, the date by which Exxon obviously had made its decision to apply lease-by-lease accounting, directed to Exxon or to the oil industry generally, which condoned such accounting practices. Instead, Exxon cites meetings held by James Langdon, Associate Assistant Administrator of the FEA, in March 1974 with Austral Oil Company and in July 1974 with Pennzoil Company, at which Langdon reportedly stated that no formal, written interpretations of the property regulation would be forthcoming, but that lease-by-lease accounting was acceptable. Exxon asserts both Austral and Pennzoil immediately informed it of the substance of Langdon's remarks, which formed the basis for its decision to alter its prior practices and adopt individual lease accounting at the Hawkins Field. But the second-hand recounting of remarks by an agency employee cannot support a defense of estoppel. The party to be estopped must have intended that his assertions be acted upon by the party raising the defense, or must act so that that party could reasonably believe it is so intended. *United States v. Ruby Co.*, 588 F.2d 697, 703 (9th Cir.1978), *cert. denied*, 442 U.S. 917

99 S.Ct. 2838, 61 L.Ed.2d 284 (1979). Even assuming *arguendo* that Langdon's views might be considered official and binding on the agency, he cannot have intended or understood that in speaking with Austral and Pennzoil he would lead Exxon astray.

Admittedly, certain agency employees did later make statements, directly to Exxon or to the industry generally, which could be interpreted as condoning lease-by-lease accounting. For example, in February 1975 Langdon [45] delivered a paper at a conference in which he illustrated his explanation of the effect of the regulations with an example plainly implying that lease-by-lease accounting was proper.[46] But Langdon's paper, the earliest direct statement cited by Exxon, came only long after the decision to apply lease-by-lease accounting at the Hawkins Field had been made, and therefore cannot have been a basis for that decision. Nor could Exxon reasonably rely on that statement, or others like it, as a basis for what it describes as its ongoing decision to maintain lease-by-lease accounting, for Exxon conveniently ignored a flurry of contemporaneous agency pronouncement to the con-

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[45] Statements by Mr. Langdon were also the cornerstone of the estoppel defense raised by Pennzoil. *See Pennzoil Co. v. DOE, supra,* 680 F.2d at 166. The TECA in *Pennzoil* on strikingly similar facts to those before this court declined to estop the government, writing that "[t]here is simply no basis in the circumstances of the present case to find unreasonableness, unfairness, or any other element of estoppel in applying the agency interpretation to the relevant period in question here." *Id.* at 176. That court added, moreover, that "The 'interpretations given by an individual member of a Board or by its attorney is not, we think, to be taken as that official kind of interpretation to which courts must pay attention.' It is 'absurd' to rely upon the unsupported opinions of agency staff attorneys when trying to divine the meaning of a regulation." *Id.* at 161-62 n. 8 (citations omitted).

[46] *See* J. Langdon, FEA Price Controls on Crude Oil and Refined Petroleum Products, 26 Annual Oil & Gas Institute of the Southwestern Legal Foundation 55, 66 (1975).

trary. Most important of these, as noted by TECA in *Pennzoil Co. v. DOE, supra,* 680 F.2d at 171, were the five official Interpretations issued by the FEA Office of General Counsel in the months preceding Ruling 1975-15 which reiterated the rule that a unit be treated as a single property. And Ruling 1975-15 itself completely dispelled any confusion Exxon may have had as to the regulations' meaning. Nevertheless, Exxon doggedly persisted, even in the face of the pellucid dictates of Ruling 1975-15, in applying individual lease accounting at the Hawkins Field.[47] Surely a regulated party as sophisticated as Exxon which ignores the only existing official pronouncements cannot be said to be reasonable when it follows instead those unauthorized views of agency employees ferretted out by Exxon which happen to coincide with Exxon's self-interest. The expression of those views should at most have served to raise a question in the minds of Exxon managers; in no event could those managers reasonably rely thereon, given the weight of official opinion to the contrary. The unauthorized statements contrary to official agency pronouncements had neither the force nor the tenor which could give Exxon solace, but were instead, in the words of Judge Jameson in *Pennzoil,* "an invitation to seek advice and a warning that if it did not do so it was proceeding at its own peril." 680 F.2d at 181 (Jameson, J., concurring). As Exxon well knew, only an official interpretation could provide it with the assurance it supposedly sought. *Id.* at 179. But Exxon chose never even to seek an official written interpretation. Though Exxon now insists that such a request would have been futile, its studied inaction at that critical time of its purported confusion belies any claim of reasonable reliance. Exxon, like

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[47] Not even Pennzoil, the direct recipient of Langdon's purported assurances in July 1974, ventured to follow Exxon's course in ignoring Ruling 1975-15, but instead applied a unit BPCL at its Walker Creek Unit as of September 1, 1975. *See Pennzoil Co. v. DOE, supra,* 680 F.2d at 160.

Pennzoil, "knowingly proceeded at its own peril when it relied on conflicting informal opinions it received as to the proper interpretation of § 212.72." *Id.* at 182 (Jameson, J. concurring).[48]

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[48] Further evidence that Exxon could not reasonably feel reassured is found in Exxon's felt need to return to the agency again and again in the wake of Ruling 1975-15 to push for clarification or modification of its then clear legal obligation to treat the Hawkins Field as a single property. *See* Def.Opp. at 30-46, 49-61. Had Exxon already obtained the kinds of assurances which might support a claim of reasonable reliance, it would not have needed to return to the agency with such frequent inquiries and comments, all the while refusing, however, to ask for a formal written interpretation. But of course Exxon obtained no such assurances in the tumultuous months following Ruling 1975-15. As Exxon itself describes, it was "pushing [DOE officials] not only to say they didn't take exception to what we were doing, but to come out with new regulations that would clearly spell out what we were doing was in accordance with the regs." File Dep. at 127. But Exxon came away each time unsatisfied: it was "distressed with the slowness in which they failed to respond." *Id.*

Indeed, Exxon's internal memoranda from that time show that the agency was at most noncommittal in its responses to Exxon's repeated requests. Agency personnel were "completely unsympathetic" to Exxon's plight. PX 159 (Memorandum from M. Krause, Jr. to files, Nov. 4, 1975). FEA counsel reportedly did not take exception to Exxon's accounting practices, "but at the same time, they did not endorse such action." PX 169 at 3 (Memorandum from Fred W. File to Exxon Price and Wage Coordination Committee, Price Subcommittee, Nov. 26, 1975). When "pressed . . . for specifics", FEA officials were "vague on details as to how new oil could be calculated in units like Hawkins." PX 180 (Memorandum from Fred W. File to O.L. Luper Dec. 31, 1975). Fred File concluded that Exxon could continue to make payments to royalty owners based on lease-by-lease accounting, but cautioned that "there is a risk that this method may result in a disallowance of costs and a problem in effecting recovery of overpayments to third parties." PX 153 (Memorandum from Fred W. File to Exxon Price and Wage Coordination Committee, Price Subcommittee, Oct. 30, 1975). That risk lingered even after the September 1976 amendments to the regulations, when Mr.

Finally, even if Exxon were able to demonstrate reasonable reliance this would still not be a proper case in which to invoke estoppel of the government. DOE correctly states the longstanding principle that the courts look with extreme disfavor upon estoppel of the government on the basis of unauthorized statements by its employees. *See, e.g., Goldberg v. Weinberger*, 546 F.2d 477, 481 (2d Cir.1976) ("The government could scarcely function if it were bound by its employees' unauthorized representations."). Te be sure, that rule is no longer so hard and fast as DOE portrays it. Dicta in a few Supreme Court cases [49] have led courts in some circuits to

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File wrote that "all doubts as to the proper method of computation before September 1, 1976 have not been removed" despite the fact that Peter Luedtke, FEA staff attorney, "did not take any exception to my interpretation and that it is his understanding that prior to September 1, 1976 upper tier oil may be computed on a tract-by-tract basis, provided the unit meets the test of the prior regulations relating to implementation of enhanced recovery techniques and significant alteration of producing patterns." The risk lingered because "while Mr. Luedtke agrees with my interpretation of the August 20, 1976 clarifications as applied to Hawkins, *his views are not official FEA interpretations.*" PX 236 at 4 (Memorandum from Fred W. File to Fred M. Perkins, October 1, 1976) (emphasis added).

[49] *Schweiker v. Hansen*, 450 U.S. 785, 788, 101 S.Ct. 1468, 1470, 67 L.Ed.2d 685 (1981) ("This court has never decided what type of conduct by a government employee will estop the government from insisting upon compliance with valid regulations governing the distribution of welfare benefits."); *Montana v. Kennedy*, 366 U.S. 308, 315, 81 S.Ct. 1336, 1341, 6 L.Ed.2d 313 (1961) ("[W]e need not stop to inquire whether, as some lower courts have held, there may be circumstances in which the United States is estopped to deny citizenship because of conduct of its officials."). Interestingly, the Court in *Schweiker v. Hansen* declined to estop the government from denying Social Security benefits to an applicant who had been misinformed by a government agent, writing that "at worst, [the agent's] conduct did not cause respondent to take action, or fail to take action, that respondent could not correct at any

erode that principle somewhat and, in certain limited circumstances to allow the government to be estopped.[50] But even those courts which have gone furthest in limiting the traditional rule have recognized that a court should estop the government from exercising its sovereign functions with great reluctance, and only if, after proof of the requisite factual elements, the court finds that on balance the injury to the private party in the absence of estoppel would be so egregious as to outweigh the public interest in the enforcement of the law. For example, the Ninth Circuit wrote in *United States v. Lazy FC Ranch*, 481 F.2d 985, 989 (9th Cir.1973) that "although we may be more reluctant to estop the government when it is acting in [its sovereign] capacity," nevertheless "estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel."

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time." 450 U.S. at 789, 101 S.Ct. at 1471 (citations omitted). So, too, could Exxon have corrected its accounting practices at the Hawkins Field at any time.

[50] *See, e.g., Portmann v. United States*, 674 F.2d 1155 (7th Cir. 1982); *Santiago v. Immigration and Naturalization Service*, 526 F.2d 488 (9th Cir. 1975); *United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973); *cf. Investors Research Corp. v. SEC*, 628 F.2d 168, 174 n. 34 (D.C. Cir. 1980) ("The fundamental principle of equitable estoppel applies to government agencies, as well as private parties."). Courts have employed various devices to get around the traditional rule, such as by distinguishing between offensive and defensive estoppel, or between proprietary and sovereign functions of the government, or by adding an additional prerequisite that the government engage in "affirmative misconduct." *See* Note, Equitable Estoppel of the Government, 79 Colum. L. Rev. 551, 555 (1979) and cases cited therein. Some courts have abandoned the device of categorical exceptions to the traditional rule and have held, in simple but opaque language, that "the estoppel doctrine is applicable to the United States where justice and fair play require it." *United States v. Lazy FC Ranch, supra* at 988.

Other courts have held that, in deciding whether to estop the governments, courts must consider, in addition to the five traditional elements of estoppel, the type of government activity being pursued and the danger of undermining important federal interests if estoppel were imposed, *Portmann v. United States*, 674 F.2d 1155, 1167 (7th Cir.1982) or, stated differently, courts must "balance the equities in each individual case." *Santiago v. Immigration and Naturalization Service*, 526 F.2d 488, 494 (9th Cir.1975) (Choy, J., concurring and dissenting). Even applying these most liberal standards, the balance weighs against Exxon. The government's case against Exxon is a major effort to enforce urgent Congressional mandates to pursue the important national policy objectives of controlling domestic crude oil prices. To estop the DOE would not only frustrate those important objectives but would allow Exxon unjustly to reap huge profits from its dubious exploration of the limits of regulatory tolerance. As the TECA described Pennzoil, Exxon was

> hardly an innocent abroad interpreting in the midst of confusing babble a direction sign labeled in a foreign language. It was an experienced traveler on familiar terrain perceptively advised by its own counsel in its own interest, and deviating from the plainly indicated direction it had theretofore followed.

680 F.2d at 179. As that same court noted, in much more sympathetic cases of impoverished Social Security claimants misled by the unequivocal misstatements of government agents, and thereby deprived of essential benefits, the Supreme Court has declined to allow estoppel against the government. *Id.* at 176-77. *A fortiori*, estoppel may not lie in this case "in favor of sophisticated oil operators exploring the possibility of dubious regulatory leeway without even requesting an official interpretation" *Id.* at 177.

IV. *Remedy*

The court has held that Exxon's obligation to establish a unit BPCL and to account on a unit-wide basis for upper and lower tier oil production at the Hawkins Field accrued on January 1, 1975. It remains for the court to determine the amount of the overcharges and to fashion an equitable remedy.

Section 209 of the Economic Stabilization Act, 12 U.S.C. § 1904 note, incorporated in Section 5(a)(1) of the EPAA, calls for violators of the oil price regulations to make restitution of overcharges. By comparing Exxon's actual accounting practices at the Hawkins Field with those Exxon should have applied, DOE has calculated the total overcharges by Exxon between January 1, 1975 and January 27, 1981, when oil prices were decontrolled, in the amount of over $895 million. DOE insists that Exxon, which owned about two-thirds of the field's production, was the driving force which controlled production and accounting practices at the Hawkins Field Unit and should therefore be held responsible for all the overcharges. Reimbursement of the overcharges to purchasers of Exxon's improperly classified crude oil is impracticable, according to DOE. Due to the pervasive reach of oil price regulation at the time these overcharges occurred, DOE contends that the overcharges worked their way throughout the economy nationwide to the millions of ultimate consumers of petroleum products. Any attempt to determine actual injury to particular purchasers would be impossibly complicated. Consequently, DOE asks the court instead to order payment of the amount of overcharges, with interest, into the United States Treasury. Finally, in order to defer future regulatory violations, DOE asks the court to assess civil penalties against Exxon in the amount of $38.27 million.

A. *Restitution*

Exxon vigorously contests the government's proposed remedy. Disputing its role as the animating force at the

Hawkins Field, Exxon argues that under the terms of the Unit Agreement each Hawkins Field interest owner takes its share of production in kind and independently determines the price at which to sell the oil. Exxon's description of itself as just another interest owner is disingenuous. Exxon was the prime mover and animating force behind the formation and operation of the Hawkins Field Unit and, under the rule of *Sauder v. DOE*, *supra*, 648 F.2d 1341, Exxon may be held responsible for all overcharges at the field.

In *Sauder* plaintiff owned a 34 percent and 41 percent interest, respectively, in two properties whose production he improperly claimed to be exempt stripper well oil. Sauder's was by far the largest single holding of the six working interest owners. He was the sole operator of the leases and it was he who improperly certified to purchasers that the production was exempt stripper oil. The TECA found that Sauder was the "animating force" behind production from the leases and could therefore "fairly be said [to have] caused the overcharges." *Id.* at 1347. The TECA held that, in those circumstances, it was within the discretion of the district court to hold Sauder liable for the full amount of the overcharges. *Id.* at 1347-48. To require the agency to seek refunds from each individual owner, the court reasoned, would create intolerable administrative obstacles to enforcement of price controls. *Id.* at 1348.

In stating its rationale of administrative workability, the *Sauder* court relied on *Tenneco Oil Co. v. Federal Power Commission*, 442 F.2d 489 (5th Cir.1971), where the Fifth Circuit upheld a Federal Power Commission order requiring Tenneco to refund all excess charges for natural gas made to Tenneco as well as to Tenneco's six co-owners or predecessors in interest at a particular field. The TECA in *Sauder* explained that the Fifth Circuit's reasoning, "to hold the central figure responsible for refunding the overcharges is necessary to effective enforce-

ment," applied equally to violations of the crude oil price regulations. 648 F.2d at 1348. The *Sauder* court wrote: "Equitable pricing is one of the important objectives of the Emergency Petroleum Allocation Act, 'and this objective cannot be bogged down in an administrative quagmire.' " *Id.*, quoting *Tenneco Oil Co. v. Federal Power Commission*, *supra*, 442 F.2d at 497.

Moreover, the TECA in *Sauder* found, shifting the burden to a central figure such as Sauder aided in the task of enforcement without working any unfairness against him. 648 F.2d at 1348. To the extent that other interest owners had shared the illegal profits, the court suggested Sauder could recover from them by applying their share of future lease revenue to repayment of the overcharges. *Id.* at 1349.

The factual basis for holding Exxon responsible for the full amount of the overcharges at the Hawkins Field is even stronger than in *Sauder*. Throughout the relevant period Exxon's working interest at Hawkins ranged between 76 and 80 percent; its share of unit production, when including royalty interest owners, was about two-thirds. PX 92 at 1-2; PX 108 at 31. Exxon was the animating force behind formation of the Hawkins Field Unit, having begun to promote it as early as 1969. Def. Opp. at 6. Exxon sought and received permission in 1969 to inject natural gas into the field, which it began the following year. PX at 4. Exxon was the animating force behind operation of the unit. The Unit Agreement named Exxon sole operator. DX Intro-4. As operator, Exxon chose the wells to shut-in, the wells where production was to go up or down, where to inject gas, and how much. PX 94; PX 121. Most important, Exxon decided how the unit would account for upper and lower tier oil, first in 1974, before the field was legally unitized, PX 85 at 11, later after Ruling 1975-15 was issued, PX 145, and finally when it switched to a unit BPCL under Sec-

tion 212.75 in September 1976. PX 141.[51] Accordingly, Exxon may "fairly be said [to have] caused the overcharges." *Sauder v. DOE*, *supra*, 648 F.2d at 1347.

Moreover, the administrative burden of requiring the agency to recover funds from each of the Hawkins Field Unit owners would be many times the burden found intolerable in *Sauder* or *Tenneco*. In contrast to the handful of working interest owners in those two cases, there are more than 200 working interest owners at the Hawkins Field, in addition to the more than 2200 royalty interest owners. To force the agency to act against each individually would plunge the agency into an "administrative quagmire" which would effectively block enforcement of oil price controls at the Hawkins Field.

Finally, Exxon, like Sauder, is not without recourse against the other interest owners, and so imposing full responsibility on Exxon will aid in enforcement of price

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[51] At a meeting of interest owners on September 10, 1974 in reply to a question "as to how the Operator planned to account for new, released and stripper oil", an Exxon representative outlined Exxon's plans to account for production on a lease by lease basis to determine total unit production in each category, but to allocate volumes of new, released and stripper oil to each tract pro rata, based on tract participation. PX 85 at 11 (Minutes of meeting of Exxon interest owners, September 10, 1974).

After Ruling 1975-15 was issued, Exxon simply informed royalty interest owners that "Exxon has elected to compute exempt oil as it did before the ruling was issued." PX 145 (Letter from Exxon to Hawkins Field interest owners, Oct. 20, 1975).

Similarly, after the September 1976 amendments to the oil price regulations Exxon peremptorily informed other interest owners that in accordance with the new rule, "[w]e have . . . established a single base production control level for the Hawkins Field Unit based on old oil produced and sold during the twelve-month period from September 1, 1975 through August 31, 1976." PX 241 (Letter from Exxon to Hawkins Field interest owners, Oct. 20, 1976).

controls without unfairness to Exxon. When Exxon decided to continue lease-by-lease accounting at the Hawkins Field in the face of Ruling 1975-15, it sought to protect itself by including with its mailing of royalty checks the following warning:

> Since FEA regulations prohibit producers from charging or purchasers from paying more than the lawful price for old oil, Exxon must advise you that royalty and other interest owners in the unit may be required to refund excess amounts received for oil heretofore classified as "new crude oil" which the FEA may rule does not qualify for exempt pricing.

PX 145 (Letter from Exxon to Hawkins Field interest owners, October 20, 1975). A few months later, weighing the pros and cons of Exxon's decision to continue lease-by-lease accounting, one Exxon manager noted reassuringly:

> Potential losses via overpayments of working and royalty interest owners are minimal since most of these are financially responsible parties, and all payments are backed by reserves.

PX 172 at 2 (Memorandum from O.R. Harrison to C.M. Harrison, Dec. 15, 1975). Similarly, after the DOE issued a Notice of Probable Violation in January 1978, Exxon again warned interest owners:

> [I]f a remedial order . . . should be received, it will probably be necessary for Exxon, pending the outcome of the controversy, to: (a) reduce payments for future production and set up an escrow account for that portion of the settlements in dispute and (b) take action with respect to alleged past overpayments as may be necessary to comply with the remedial order.

PX 246 to 2 (Letter from Exxon to Hawkins Field interest owners, January 26, 1978). Should Exxon turn to

the other Hawkins Field interest owners for contribution or indemnification Exxon, like Sauder, could attempt to deduct the other interest owners' share of the overcharges from future royalty payments.[52]

Exxon attempts to escape liability for the overcharges by arguing first that the oil price regulations simply do not apply to the two-thirds of the Hawkins Field production owned by Exxon. By their terms, says Exxon, the regulations apply only to a "first sale" of domestic crude petroleum. 10 C.F.R. § 212.71. All Exxon-owned production was simply transferred from Exxon's production division to its refining division. No "sale" ever occurred, therefore the regulations do not apply. In any event, if the court does deem Exxon's intra-company transfers to be "sales", Exxon was the first purchaser of all Exxon-owned production, along with virtually all of the remaining production, and therefore Exxon as purchaser is the victim of the overcharges to whom reimbursement is due.

Exxon's arguments are without merit. The Subpart D regulations, it is true, have always applied only to a "first sale" of domestic crude petroleum. 10 C.F.R. § 212.71. And "first sale" was formally defined by the agency only in February 1976, as follows:

> "First sale" means the first transfer for value by the producer or royalty owner. With respect to transfers between affiliated entities, the "first sale"

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[52] Exxon's argument that it cannot be held liable for overcharges on the 5 percent of Hawkins Field production owned and taken by Texaco was rejected in *Sauder v. DOE, supra,* 648 F.2d 1341. Sauder argued, like Exxon, that he could not be found responsible for the overcharges on the share of production received and sold by other interest owners. The TECA rejected Sauder's argument and held him, as operator and animating force of the unit, responsible for all overcharges from the leases, regardless of whether Sauder himself received all of the monies illegally obtained. 648 F.2d at 1347-49.

> shall be imputed to occur as if in arms-length transactions.

41 Fed.Reg. 4931, 4940 (1976); 10 C.F.R. § 212.72 (1977). Contrary to Exxon's arguments, however, the February 1976 definition of "first sale", which clearly brings intra-company transfers within the ambit of the regulation, was not a break from, but rather a confirmation, past agency application of the term. Official agency Interpretations issued before the February 1976 definition referred to "intrafirm sales."[53] At the request of the FEA,[54] however, the Congress in the EPCA directed promulgation of the "first sale" definition to clarify the FEA's already existing authority. As the Conference Report explained:

> It is the intention of the conferees that the term "first sale" be defined in the regulations *to make clear* that it applies to the first transfer of a barrel of crude oil for value in an arms-length transaction. *With respect to transactions between affiliated or associated companies, FEA has the authority to impute a transfer value,* which bears a reasonable relationship to transfers between unaffiliated persons in arms-length transactions. *It is the conferees' understanding that the regulation defining "first sale" could extend principles and procedures now applicable under current regulations* to determine transfer prices for imports as well as the point of sale and sales price of old crude oil and stripper well oil, *to all ceiling prices promulgated under the new pricing program.*

S.Rep. No. 516, 94th Cong., 1st Sess. at 190 (1975) (emphasis added), U.S.Code Cong. & Admin.News, p. 2032.

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[53] *See, e.g.*, Interpretation 1975-3, 42 Fed.Reg. 23,724; 23,726 (1977).

[54] *See* PX 304 at 11-12 (Letter from FEA Administrator Frank Zarb to Sen. Henry Jackson, December 6, 1975).

That the crude oil price regulations applied to intra-company transfers even before the clarifying amendment is supported by TECA decisions interpreting similar language in analogous rules. In *Johnson Oil Co. v. DOE*, 690 F.2d 191 (Em.App.1982), a crude oil reseller argued that it should be allowed to charge higher New Item prices under the Subpart F reseller pricing rules, for crude oil sold during a certain period. In order to reap the benefits of the New Item Rule, the seller could not have sold that item in the preceding year. 10 C.F.R. § 212.111(a)(1). Johnson Oil argued that all its crude oil "transactions" in the year preceding the overcharge period were intra-firm transfers, not "sales", which it interpreted to mean only arms-length transactions between third parties. The TECA disagreed, holding that "the plain meaning of the rule does not differentiate between sales to affiliated parties . . . and transactions." 690 F.2d at 197. *Cf. Gulf Oil Corp. v. DOE*, 671 F.2d 485 (Em.App.1982) ("first sale" of natural gas liquids and natural gas liquid products under Subpart K includes "transfers" by refiners and processors to their affiliated marketers). In the same manner, the plain meaning of "first sale" in 10 C.F.R. § 212.71 includes intra-company transfers of crude oil from production to refining divisions. To hold otherwise would lead to the ludicrous result of allowing integrated oil companies largely to escape crude oil price regulation, a result plainly not contemplated by Congress.

If the transfers of Hawkins Field crude oil from Exxon as producer to Exxon as refiner are "first sales", says Exxon, then those sales, along with Exxon's purchases from the other interest owners of the bulk of the remaining Hawkins Field production resulted in overcharges suffered by Exxon as refiner, and any refunds should be made to it. But Exxon's portrayal of itself as victim ignores the workings of the mandatory Entitlements Program which, together with price controls on refiners, resellers, and retailers, allowed Exxon to spread the cost of its Hawkins

Field overcharges across the land. The purpose of the Entitlements Program was to permit all refiners to share the financial benefits of the limited available quantity of relatively inexpensive price-controlled crude oil. Under the Entitlements Program, the FEA each month allotted to each refiner a certain number of entitlements, equal to that refiner's deemed share of the old oil refined nationwide during that month. If a refiner was in fact able to obtain and refine a proportionately large amount of low-priced old oil, greater than its allotted entitlements, that refiner would have to buy entitlements from those less fortunate refiners which refined a proportionately small amount of low-priced oil. The price of an entitlement was roughly the difference between the price of controlled and uncontrolled oil. The effect of the entitlement transfers, therefore, was to equalize the average weighted crude oil costs of all refiners. *Union Oil Co. of California v. DOE*, 688 F.2d 797, 801-02 (Em.App. 1982); *Pasco, Inc. v. FEA*, *supra*, 525 F.2d at 1395.

As a result of Exxon's misclassification, less old oil was reported to the Entitlements Program. DOE therefore issued fewer entitlements to each refiner, and each refiner had to purchase more, or sell fewer, entitlements than it would have if Exxon had properly classified the Hawkins Field oil. Exxon, by improperly classifying old oil as new oil at the Hawkins Field, thereby increased the average cost of crude oil of all refiners. At the same time, although Exxon as refiner appeared initially to bear the burden of the overcharges of Exxon as producer, in fact Exxon was able to keep the ill-gotten gains by improving its entitlements position. It was able to buy fewer, or sell more, entitlements than it had a right to.

Exxon argues that it must be allowed to conduct further discovery to determine if the Entitlements Program in fact operated as it was designed and to trace the Hawkins Field overcharges to their ultimate victims. In effect, Exxon would like to launch a nationwide inquiry into the workings of more than 200 domestic refiners during a period of several years. Such an inquiry, whose

purpose could only be to postpone Exxon's day of reckoning, is unnecessary. The cost-spreading effect of the Entitlements Program has long been recognized by the TECA. The purpose of the Entitlements Program was "to spread the benefits of access to old price-controlled oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, all regions of the country, and among all consumers of petroleum products." *Cities Service Co. v. FEA*, *supra*, 529 F.2d 1016, 1021. Just as the program spread the benefit of access to old oil, so too did the program spread the burden of Exxon's overcharges among all sectors of the petroleum industry, all regions, and all consumers. The TECA faced a closely analogous situation in *Union Oil Co. of California v. DOE*, *supra*, 688 F.2d 797, where misclassification of price-controlled old oil as exempt oil

> reduced the total amount of crude oil production subject to price controls each month and therefore increased the total cost of the available crude oil supply. As a result, the benefits of price-controlled crude oil which were distributed among all refiners by the Entitlements Program were reduced. *Thus, to the extent that crude oil producers sold otherwise price-controlled oil as uncontrolled crude oil . . . the higher cost of such uncontrolled crude oil was distributed among all domestic refiners through the operation of the Entitlements Program.*

Id. at 802 (emphasis added).

Interestingly, Exxon itself, though it now feigns surprise and demands discovery, has long had the same understanding of the workings of the Entitlements Program. At a meeting of the Hawkins Field interest owners shortly after DOE issued to Exxon the January 1978 Notice of Probable Violation, one owner asked who would ultimately benefit if the Hawkins Field owners were required to make refunds to the purchasers improperly classified Hawkins Field crude oil. Exxon attorney Barbara Finney explained "that the refunds to the purchasers would in turn require the purchasers to buy more

entitlements from other refiners and that the net effect would be a decrease in the overall cost to the refining industry for domestic crude oil." PX 247 at 8 (Minutes of meeting at Hawkins Field working interest owners, February 3, 1978). Just as refunds would be spread throughout the industry to reduce the overall average cost to refiners of domestic crude oil, so did Exxon's overcharges spread throughout the industry to increase the average cost to refiners of domestic crude oil.[55]

At the same time, price regulations applicable to refiners allowed them to pass along the inflated costs of Hawkins Field crude oil to purchasers of refined products. Under those rules the price a refiner could charge for a refined product was generally limited to the refiner's May 15, 1973 price plus, among other costs, the increased cost of crude oil. 10 C.F.R. § 212.83(c)(2)(iii). Similar pass-through provisions for increased costs also applied to crude oil resellers, product resellers and retailers. *See* 10 C.F.R. Part 212, Subparts F and L. As a result of the pervasive system of price controls which then existed, therefore, Exxon's overcharges were not, as it simplistically asserts, borne by Exxon itself, but instead were borne by ultimate consumers of petroleum products throughout the entire country.[56]

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[55] To the extent Exxon suffered as one of the 200 domestic refiners whose costs were inflated by the Hawkins Field overcharges, Exxon is barred by the doctrine of "unclean hands" from receiving equitable restitution of any of the overcharges. *See Citronelle-Mobile Gathering, Inc. v. Edwards,* 669 F.2d 717, 723 (Em.App. 1982).

[56] On November 23, 1982 and on January 20, 1983, certain refiners and independent retailers, respectively, filed motions to intervene in this action, arguing that they as victims of the Hawkins Field overcharges were entitled to any recovery DOE might obtain. The preceding discussion shows, however, that due to the workings of regulations applicable throughout the oil industry, from producer to retailer, the real victims are the unidentifiable millions of ultimate consumers of petroleum products. Accordingly, the motions to intervene are denied.

The broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each. Yet this court is still faced with the task of fashioning an equitable remedy. The DOE suggests that, because ultimately all consumers suffered as a result of the overcharges, it would be most appropriate for the court to order payment into the Treasury of the United States government, the representatives of all citizens. Exxon argues that the statute allows only reimbursement of the first purchasers of the overpriced crude oil, and then only after the DOE identifies the victims of the overcharges and proves the specific damages suffered by each. In any event, Exxon continues, under *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (Em.App.1982), payment to the United States Treasury may not be considered restitution.

As noted above, Section 209 of the Economic Stabilization Act empowers the court to require restitution of funds obtained in violation of the oil price regulations. The scope of the court's power is much broader than Exxon allows. To begin with, the remedy of restitution is fundamentally different from the remedy of damages. In *Sauder v. DOE*, *supra*, 648 F.2d 1341, Sauder argued that the DOE, in seeking to impose upon him alone responsibility for all overcharges, had tried to read into the statute a damages remedy not within the common law concept of restitution. In rejecting Sauder's argument, the TECA distinguished restitution from damages, writing: " 'In equity, restitution is usually thought of as *a remedy by which defendant is made to disgorge ill-gotten gains or* to restore the status quo *or* to accomplish both objectives.' " *Id.* at 1348, quoting 5 Moore's Federal Practice ¶ 38.24[2], 38-195 (2d ed. 1981) (emphasis added). The agency, the court continued, "does not seek to recover Mobil's *damages*, which may or may not be the amount of the overcharges." 648 F.2d at 1348. The TECA stated the difference even more bluntly in *Citro-*

nelle-Mobile Gathering, Inc. v. Edwards, supra, 669 F.2d 717:

> The central purpose of restitution is to determine the amount by which the wrongdoer has been unjustly enriched and then to make him disgorge that amount. *No proof is required that the plaintiff was damaged, much less the amount of any damage.*

Id. at 722 (emphasis added). Accordingly, the DOE need not attempt the impossible task of proving the identity and particular damages of each victim of the Hawkins Field overcharges in order for this court to order restitution.

As explained above, prior to decontrol in January 1981 DOE controlled the price of oil at every stage of production. In those circumstances, if a court ordered restitution of overcharges to the first purchaser of crude oil, that reimbursement would eventually be passed along to the ultimate consumer of petroleum products. *See Grigsby v. DOE*, 4 Energy Mgt. (CCH) ¶ 26,378 at 28,841 (W.D. La.1982). Since decontrol, however, there has existed no ready method of ensuring that overcharges will be refunded to their ultimate vicitms, the consumer. To order a refund to the first purchaser would simply result in a windfall gain for that purchaser—ironically, in this case, Exxon itself—who would be under no obligation to pass the refund along.

Exxon maintains nevertheless that it is beyond the equitable powers of this court to order payment into the United States Treasury and bases its argument on *Citronelle-Mobile Gathering, Inc. v. Edwards, supra*, 669 F.2d 717. In that case two domestic crude oil resellers sold crude oil to PETCO, the wholly-owned foreign subsidiary of an American corporation, NEPCO. The oil was refined in the Bahamas by BARCO, a subsidiary of PETCO, and then shipped to NEPCO in the United States. NEPCO in turn sold the refined products to utilities and institutions on the east coast. The sellers claimed the first sales were export sales, exempt from

price controls. The district court denied the sellers' claims and held them in violation of the price ceilings. The government asked that the overcharges be paid into an escrow account for subsequent distribution to NEPCO customers. Instead, the district court *sua sponte* ordered restitution to the United States Treasury. The TECA affirmed, except as to remedy, holding that "payment to the United States Treasury is not restitution in the true sense of the word, or in the objectives of the statutes involved." 669 F.2d at 722.

Careful reading of the TECA decision reveals, however, that the court's modification of the district court's remedy was not a blanket prohibition on the ordering of restitution to the Treasury. The district court, TECA explained, shaped its remedy under the mistaken impression that the ultimate overcharge victims were undeterminable millions of individuals along the east coast. The TECA found, however, that "the sale of the overpriced oil was made to determinable utilities and other institutions along the Atlantic seaboard." 669 F.2d at 722. Having demonstrated injury to an identifiable class of persons, the government had a duty to try to ascertain those overcharged and to make restitution to them, with interest, from the restitution funds. *Id.* at 723. To accomplish that end, the TECA remanded to the district court with instructions to order the violators to make restitution to the Treasury, but under special order of the court directing the Treasury to hold the funds in an escrow account for subsequent distribution, at DOE's direction, to NEPCO customers. *Id.*

The TECA's refusal in *Citronelle* to allow unconditional payment into the Treasury was clearly based on the facts in that case which permitted identification of the victims of the overcharges.[57] The four shipments

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[57] To the extent that the utilities which purchased overpriced oil from NEPCO were able under state public utility regulation to pass through increased operating costs to customers, presumably those same state regulatory bodies could act to ensure that the effects of the refunds received by those

which were the subject of inquiry in *Citronelle* all occurred within the six months ending in late May 1974, before implementation of the Entitlements Program. *See Citronelle-Mobile Gathering, Inc. v. O'Leary*, 499 F.Supp. 871, 874-75 (S.D.Ala.1980), *aff'd sub nom. Citronelle-Mobile Gathering, Inc. v. Edwards, supra*, 669 F.2d 717. Consequently NEPCO's customers alone bore the entire burden of the overcharges. DOE could measure their losses accurately and direct appropriate payment to them from the escrow fund suggested by the TECA.

Exxon's Hawkins Field overcharges, on the other hand, were diffused throughout the country. Creation of an escrow fund would serve no purpose. Monies in such a fund would languish there indefinitely, because DOE could never accurately determine the losses suffered by any one claimant. Thus, the facts which required the court in *Citronelle* to order actual reimbursement of overcharges are not present here, and this court is not precluded on the facts before it from ordering Exxon to make restitution to the Treasury.

A district court, sitting as a court of equity, unless applicable statutes provide otherwise, has " 'all the inherent equitable power of the District Court . . . available for the proper and complete exercise of that jurisdiction'; and has power 'to do equity and mold each decree to the necessities of the particular case.' " *Citronelle-Mobile Gathering, Inc. v. Edwards, supra*, 669 F.2d at 722, quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S.Ct. 1086, 1089, 90 L.Ed.2d 1332 (1946). The applicable statutes here do not limit this court's equitable powers. *Sauder v. DOE, supra*, 648 F.2d at 1348. The explicit reference to restitution in Section 209 of the ESA was to settle any doubt that " 'there was an inherent equitable power in the court to set things right and order restitution.' " *Id.*, quoting S.Rep.No. 507, 92d

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utilities from the escrow account would also eventually reach the ultimate consumer. Importantly, no corresponding mechanism exists in the case before the court.

Cong., 1st Sess. 9 (1971), U.S. Code Cong. & Admin. News, pp. 2283, 2291. Section 209 neither limits the power of the court to restitution nor to a particularly strict interpretation of restitution. 648 F.2d at 1348.

Furthermore, to order restitution to the Treasury in these circumstances is consistent with the principle underlying enforcement of the regulations that "[a]ctions taken by the United States under ESA § 209 are taken to enforce public, not private rights. Thus, compensation is 'a by-product of the agency's effort to reestablish compliance with its regulatory scheme." *Citronelle-Mobile Gathering, Inc. v. Edwards, supra,* 669 F.2d at 722.

Indeed, the TECA in *Citronelle* did not disapprove any and all payments of restitution to the Treasury; it disapproved only the unconditional payment ordered by the district court. But the TECA itself directed payment into the Treasury, into an escrow account subject to certain conditions. In accordance with that principle, this court shall order Exxon to make restitution of the full amount of the overcharges, plus interest, to the Treasury, for deposit into an escrow account.

The task of this court in delineating the terms and conditions of that account has been made easier by recent Congressional action. On December 21, 1982 Congress enacted Pub.L. No. 97-377, 96 Stat. 1830 (1982) providing continuing appropriations for fiscal year 1983. Section 155 of that law provides a formula for the disbursement of "designated petroleum violation escrow funds", defined as "amounts (not in excess of $200,000,000) which are derived from settlements from alleged petroleum pricing and allocation violations . . . ." The purpose of Section 155 is

> to provide the Secretary of Energy the exclusive authority for the disbursement of the designated petroleum violation escrow funds for limited restitutional purposes (1) which are reasonably expected to benefit the class of persons injured by such violations,

> and (2) which . . . are likely not to be . . . otherwise refunded to injured persons because the purchasers of the refined petroleum products cannot be reasonably identified or paid or because the amount of each purchaser's overcharge is too small to be capable of reasonable determination.

Pub.L. No. 97-377, § 155(a), 96 Stat. 1830, 1919 (1982).

Under the terms of the new law, the Secretary of Energy must distribute the escrow fund to the governors of each of the states, with the amount due each state based on that state's share of nationwide consumption of refined petroleum products from 1973 to 1981. *Id.*, § 155 (c), (d). Each state must then use the funds under one or more of five existing federal energy conservation programs identified in the new law, including weatherization of buildings; implementing state energy conservation programs; cutting energy consumption in, or finding cheaper alternate energy sources for, schools and hospitals; promoting conservation by small businesses and individuals; and helping poor people pay home utility bills.[58] None of the funds may be used to defray administrative expenses of the DOE or any state. *Id.*, § 155(f).

The court shall order Exxon to make restitution to the United States Treasury of the full amount of the Hawkins Field overcharges, together with interest from the date of overcharge, the monies to be deposited into an escrow account, held in trust by the Department of Energy, to be disbursed in accordance with the proce-

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[58] The "energy conservation programs" identified in Section 155(e)(2) are: (1) the program under Part A of the Energy Conservation in Existing Buildings Act of 1976, 42 U.S.C. § 6861 *et seq.*; (2) the programs under part D of title III of the Energy Policy and Conservation Act, 42 U.S.C. § 6321 *et seq.*; (3) the program under part G of title III of the Energy Policy and Conservation Act, 42 U.S.C. § 6371 *et seq.*; (4) the program under the National Energy Extension Service Act, 42 U.S.C. § 7001 *et seq.*; and (5) the program under the Low-Income Home Energy Assistance Act of 1981, 42 U.S.C. § 8621 *et seq.*

dures set forth in Section 155 of Pub.L. No. 97-377, 96 Stat. 1830, 1919 (1982).

In formulating its order, the court in no way relies on Section 155 as an express statutory grant of authority to this court, but acts instead in the exercise of its broad equitable powers to order restitution.[59] However, Section 155 clearly bespeaks the intent of Congress that violators of the petroleum price regulations should be made to disgorge their illgotten gains even in situations, like the case before the court, where the victims of the petroleum overcharges cannot be identified. The colossal scale of Exxon's wrongdoing, and the workings of pervasive regulations to spread the burden of that wrongdoing impossibly far and wide, must not deter this court from fashioning an appropriate equitable remedy. The purpose of the domestic petroleum price regulations was to keep oil prices down, to relieve consumers of some of the burden of towering oil costs. The five energy conservation programs identified in Section 155 operate across the nation to reduce that same burden, either by reducing overall consumption through conservation or by direct financial assistance to those most in need. Although one might speculate as to alternative remedies, this court respects the wisdom of the solution chosen by Congress and shall adopt it as the most appropriate equitable remedy in the circumstances of this case.

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[59] Accordingly, the escrow fund established pursuant to this court's order shall of course not be subject to the provisions of subsection (e) (1) of Section 155 which limit the monies the Secretary of Energy may disburse to $200 million—received in settlements, not pursuant to judicial order—and which require a finding that the funds to be disbursed "are not likely to be required for satisfying claims of potential claimants . . ." and that "the use [of funds] under this section would be consistent with the remedial order or consent order covering such funds." Section 155 shall otherwise apply in its entirety under this court's order as the set of terms and conditions governing DOE's handling of the escrow account established to receive restitution payments from Exxon.

B. *Amount of overcharges*

The court has held that Exxon should have established a unit BPCL on January 1, 1975, the date a significant alteration in producing patterns occurred at the Hawkins Field Unit, and that Exxon may not claim the incentives of Section 212.75, but instead must proceed under Section 212.72. That done, calculation of Exxon's overcharges becomes a straightforward matter of comparing Exxon's actual accounting practices with those it should have applied. Using production, sales and price data derived from Exxon documents obtained through audits or discovery,[60] DOE has calculated the amount of overcharges for each month from January 1975 through January 1981. For each month DOE has determined the appropriate unit BPCL and total unit production, as well as cumulative deficiency, if any. In so doing DOE has accorded Exxon the benefit of every favorable modification of the applicable regulations, even if not claimed by Exxon.[61] Simple addition and subtraction yield the number of barrels, if any, Exxon was allowed to claim as upper-tier or exempt. Comparison with the number of barrels actually claimed by Exxon as upper-tier or exempt yields the number of barrels in violation. That number, when multiplied by the difference between the price received by Exxon and the lower-tier prices, yields the amount of overcharges for that month. Finally, DOE has totalled the cumulative overcharges each month. The summary data which were the basis of DOE's calculations are reproduced in Appendix I to this opinion.

Although Exxon contends that DOE's overcharge calculations are "grossly inflated", Def.Opp. at 289, Exxon has

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[60] The unit BPCL and cumulative deficiency for January 1975 came from information given to Texaco, a Hawkins Field interest owner, in early July 1975. PX 117 (Letter from H.M. Krause, Jr. to Texaco, Inc., April 2, 1975). Data on the amounts of lower and upper-tier or exempt oil claimed by Exxon was derived from statements given by Exxon to Mobil, another Hawkins Field interest owner. PX 284.

[61] *See* Pltf.Mem. at 135-39.

not challenged the mathematical accuracy of DOE's calculations, nor the accuracy of the underlying data. Instead Exxon limits its attack to a reiteration of its previous arguments that it acted properly in establishing a unit BPCL on September 1, 1976 under Section 212.75. The court has rejected Exxon's arguments.

Accordingly, there being no dispute of fact as to the validity or accuracy of DOE's calculations, the court finds the total amount of overcharges by Exxon at the Hawkins Field Unit from January 1975 through January 1981 to be $895,501,163.85.

C. *Interest*

The court's equitable powers to order restitution permit the court to deprive the wrongdoer of all enrichment obtained at the victim's expense, *Citronelle-Mobile Gathering, Inc. v. Edwards, supra*, 669 F.2d at 722, and that enrichment necessarily includes the benefits Exxon obtained by having the use over the years of the money illegally obtained. Accordingly, this court shall order that restitution of Exxon's overcharges shall be made with interest from the date of overcharge. *Cf. Bonray Oil Co. v. DOE*, 472 F.Supp. 899, 904 (W.D.Okl.1978), *aff'd per curiam* 601 F.2d 1191 (Em.App.1979) ("[T]he requirement that sellers who violate regulations and orders promulgated under the EPAA also pay interest on the amount of the overcharge is a rational method to 'make whole' those who have been overcharged.").

DOE proposes several alternative rates of interest, ranging from Exxon's annual average rate of return, after tax, for capital deployed in domestic production activities from 1975 through 1981, 23.7 percent; the prime rate; or, finally, the schedule of interest rates it has applied in administrative enforcement actions since February 1980.

The court adopts the last formula. It is identical to the schedule long used by the Federal Energy Regulatory Commission in its enforcement actions, *see* 46 Fed.Reg.

21,412 (1981). It is the schedule which DOE would have applied to Exxon's overcharges had they been assessed in a DOE Remedial Order following administrative adjudication. Most important, because the rate has since October 1979 been based on an average of prime rate values as determined by the Federal Reserve, the schedule bears a reasonable relation to the value to Exxon of the funds it unlawfully retained. The formula for calculating the applicable rate, as well as a summary of the rates determined according to that formula through July 1982, are attached hereto as Appendix II.

D. *Civil Penalties*

Finally, the government asks the court to assess civil penalties against Exxon. Section 208(b) of the ESA, 12 U.S.C. § 1904 note, incorporated in Section 5(a)(1) of the EPAA, 15 U.S.C. § 754, authorizes the court to assess civil penalties of not more than $2500 for each violation of the pricing regulations occurring prior to December 16, 1975. The EPCA increased the penalties to $20,000 for each violation after December 16, 1975. Agency regulations provide that "[e]ach day that a violation . . . continues shall be deemed to constitute a separate violation within the meaning of the provisions of this chapter relating to . . . civil penalties." 10 C.F.R. § 205.203(a)(2). Counting each day that overcharges occurred at the Hawkins Field as a separate violation from January 1, 1975 through January 27, 1981, DOE has calculated the maximum civil penalty to be $38.27 million.

Upon careful consideration of the voluminous record in this case,[62] the court declines to assess civil penalties against Exxon. As the DOE has itself admitted, the oil price regulations are complex, and the unit property rule which is the cornerstone of DOE's case was only implicit

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[62] In connection with their cross-motions for summary judgment, the parties filed more than 1,000 pages of memoranda, supported by fourteen volumes of appendices containing approximately 600 exhibits.

in the original property definition of Section 212.72. *See Pennzoil Co. v. DOE, supra,* 680 F.2d at 176.

This is not to excuse Exxon's behavior. Exxon pushed the agency at every turn and probed each nuance in the regulations to interpret them to Exxon's advantage, sometimes ignoring their unequivocal dictates. Still, DOE has not proven, because it need not, that Exxon in fact gerrymandered production at the Hawkins Field in an attempt knowingly to circumvent price controls. The course of conduct which brought Exxon within the ambit of the unit property rule of Section 212.72—unitization and gas injection—was undertaken for bona fide business reasons and indeed was traced long before any regulations on crude oil prices existed.

Nor did Exxon attempt to dissimulate its accounting practices at the Hawkins Field. On the contrary, it made repeated inquiries and comments, accurately representing its conduct to the agency, in the hope of changing agency policy. The informal replies Exxon received, though no basis for estoppel of the government, were nevertheless at times puzzling.

The court finds that the circumstances of this case do not warrant assessment of civil penalties.[63]

Plaintiff shall submit a proposed judgment for the court's consideration no later than 15 days from the date hereof, and defendant shall file its reply thereto no later than 10 days thereafter.

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[63] Other courts which have found regulatory violations and ordered restitution of overcharges have nevertheless refused to assess civil penalties and often for reasons similar to those given above. *See, e.g., Sauder v. DOE,* 4 Energy Mgt. (CCH) ¶ 26,157 (D. Kan. 1980), *aff'd,* 648 F.2d 1341 (Em.App. 1981) (award of penalties inappropriate because regulatory definition of "property" confusing and agency made no finding of gerrymandering); *Citronelle-Mobile Gathering, Inc. v. O'Leary,* 499 F.Supp. 871 (S.D. Ala. 1980), *aff'd sub nom. Citronelle-Mobile Gathering, Inc. v. Edwards, supra,* 669 F.2d 717 (penalties inappropriate because, *inter alia,* violators clearly explained their behavior to Commerce Department).

APPENDIX I

OPERATOR: Exxon Company, USA
PROPERTY NAME: Hawkins Field Unit
COUNTY AND STATE: Wood County, Texas

Date	BPCL	Barrels Sold	Cum. Def.	(Allowable Sales Bbls) New	Released	Total
			2310657.00			
1/75	2262898.00	3460686.80	1112868.20	0.00	0.00	0.00
2/75	2422029.00	3088253.30	446643.90	0.00	0.00	0.00
3/75	2873208.00	3476100.26	0.00	156248.36	156248.36	312496.72
4/75	3132625.00	3325164.41	0.00	192539.41	192539.41	385078.82
5/75	3374995.00	3437900.22	0.00	62905.22	62905.22	125810.44
6/75	3210502.00	3327490.34	0.00	116988.34	116988.34	233976.68
7/75	3306766.00	3406759.40	0.00	99993.40	99993.40	199986.80
8/75	3310681.00	3426979.44	0.00	116298.44	116298.44	232596.88
9/75	3148044.00	3328544.70	0.00	180500.70	180500.70	361001.40
10/75	3400107.00	3420890.39	0.00	20783.39	20783.39	41566.78
11/75	3211371.00	3282074.89	0.00	70703.89	70703.89	141407.78
12/75	3294406.00	3426138.29	0.00	131732.29	131732.29	263464.58
1/76	2262898.00	3411987.05	0.00	1149089.05	1149089.05	2298178.10
2/76	2927544.61	3268644.39	0.00	341099.78	0.00	341099.78
3/76	3156445.24	3392140.02	0.00	235694.78	0.00	235694.78
4/76	3054624.43	3350070.55	0.00	295446.12	0.00	295446.12
5/76	3156445.24	3456725.59	0.00	300280.35	0.00	300280.35
6/76	3059477.23	3311341.49	0.00	251864.26	0.00	251864.26
7/76	3161459.80	3404466.24	0.00	243006.44	0.00	243006.44
8/76	3161459.80	3411372.07	0.00	249912.27	0.00	249912.27
9/76	3059477.23	3200400.82	0.00	140923.59	0.00	140923.59
10/76	3161459.80	3267286.41	0.00	105826.61	0.00	105826.61
11/76	3059477.23	3168078.89	0.00	108601.66	0.00	108601.66
12/76	3161459.80	3151089.10	10370.70	0.00	0.00	0.00
1/77	3161459.80	2825880.59	345949.91	0.00	0.00	0.00
2/77	2957494.56	2647308.40	656136.07	0.00	0.00	0.00

Date	BPCL	Barrels Sold	Cum. Def.	(Allowable Sales Bbls) New	Released	Total
3/77	3161459.80	2922117.52	895478.35	0.00	0.00	0.00
4/77	3059477.23	2777140.72	1177814.86	0.00	0.00	0.00
5/77	3161459.80	2920300.05	1418974.61	0.00	0.00	0.00
6/77	3059477.23	2747579.21	1730872.62	0.00	0.00	0.00
7/77	3161459.80	2733688.10	2158644.32	0.00	0.00	0.00
8/77	3161459.80	2658730.03	2661374.10	0.00	0.00	0.00
9/77	3059477.23	2530527.16	3190324.16	0.00	0.00	0.00
10/77	3161459.80	2625265.25	3726518.71	0.00	0.00	0.00
11/77	3059477.23	2505620.20	4280375.74	0.00	0.00	0.00
12/77	3161459.80	2553364.93	4888470.61	0.00	0.00	0.00
1/78	3161459.80	2471858.78	5578071.63	0.00	0.00	0.00
2/78	2957494.56	2209923.76	6325642.43	0.00	0.00	0.00
3/78	3161459.80	2409479.91	7077622.32	0.00	0.00	0.00
4/78	3059477.23	2241673.15	7895426.40	0.00	0.00	0.00
5/78	3161459.80	2279936.58	8776949.62	0.00	0.00	0.00
6/78	3059477.23	2313557.83	9522869.01	0.00	0.00	0.00
7/78	3161459.80	2344094.63	10340234.18	0.00	0.00	0.00
8/78	3161459.80	2241264.50	11260429.48	0.00	0.00	0.00
9/78	3059477.23	2083630.89	12236275.82	0.00	0.00	0.00
10/78	3161459.80	2232892.02	13164843.60	0.00	0.00	0.00
11/78	3059477.23	2100939.43	14123381.40	0.00	0.00	0.00
12/78	3161459.80	2102996.02	15181845.18	0.00	0.00	0.00
1/79	3161459.80	2056508.20	16286796.78	0.00	0.00	0.00
2/79	2957494.56	1935355.61	17308935.73	0.00	0.00	0.00
3/79	3161459.80	2032336.67	18438058.86	0.00	0.00	0.00
4/79	3059477.23	1961051.46	19536484.62	0.00	0.00	0.00
5/79	3161459.80	1965368.10	20732576.32			

APPENDIX I—Continued

PURCHASER: Exxon Company, USA

FIELD: Hawkins

Actual Sales	(Sales In Apparent Violation) # Bbls	Bonus	Overcharges	Cum. Overcharges
2297789.00	2297789.00	6.0000	13786734.00	13786734.00
1997999.00	1997999.00	6.4000	-12787193.60	26573927.60
2180673.00	1868176.28	6.4000	11956328.19	38530255.79
1799331.00	1414252.18	6.7000	9475489.61	48005745.40
1836020.00	1710209.56	6.7000	11458404.05	59464149.45
1685954.00	1451977.32	6.7011	9729845.22	69193994.67
1722834.00	1522847.20	7.0026	10663889.80	79657864.47
1717721.00	1485124.12	7.1900	10678042.42	90535926.89
1716269.00	1355267.60	7.2900	9679900.80	100415827.89
1498974.00	1457407.22	7.5400	10988850.44	111404678.13
1455581.00	1314173.22	7.7900	10237409.38	121642087.51
1609927.00	1346462.42	7.7900	10488942.25	132131029.76
2417713.00	119534.90	7.7900	931176.87	133062206.63
1934181.43	1593081.65	5.9700	9510697.45	142572904.08
2027418.00	1791723.22	6.0100	10768256.55	153341160.63
1995410.00	1699983.88	6.0500	10284781.45	163625942.08
2068392.00	1768111.65	6.0800	10750118.83	174376060.91
2008093.00	1756228.74	6.1100	10730557.58	185106618.49
2039907.00	1790900.56	6.1100	10979082.42	196085680.91
2033008.09	1783095.73	6.1100	10894714.91	206980395.82
1903505.51	1762581.92	6.1144	10777130.87	217757526.69
1903657.26	1797830.65	6.1146	10993015.30	228750541.90
1903581.24	1794979.58	6.1145	10975402.62	239725944.61
1903581.25	1903581.25	6.1145	11639447.55	251365392.16
1903581.26	1903581.26	5.9151	11259873.51	262625265.67
1903581.24	1903581.24	5.9151	11259873.39	273885139.06
1903581.24	1903581.24	5.4664	10405736.49	284290875.55
1903581.25	1903581.25	5.4664	10405736.55	294696612.10
1903581.24	1903581.24	5.4664	10405736.49	305102348.59
1903581.26	1903581.26	5.4664	10405736.60	315508085.19
1903581.25	1903581.25	5.4664	10405736.55	325913821.74
1857249.00	1857249.00	5.4454	10113463.70	336027285.44
1902656.51	1902656.51	5.6977	10840766.00	346868051.44
1902656.49	1902656.49	5.9269	11276854.75	358144906.19
1902656.49	1902656.49	6.1562	11713133.88	369858040.07
1902470.49	1902470.49	6.1860	11768682.45	381626722.52
1902656.50	1902656.50	6.2159	11826722.54	393453445.06
1902656.50	1902656.50	6.2457	11883421.70	405336866.76
1902656.51	1902656.51	6.2755	11940120.93	417276987.69
1902656.50	1902656.50	6.3054	11997010.30	429273997.99
1902656.51	1902656.51	6.3352	12053709.52	441327707.51
1902656.01	1902656.01	6.3750	12129432.06	453457139.57

APPENDIX I—Continued

PURCHASER: Exxon Company, USA

FIELD: Hawkins

Actual Sales	(Sales In Apparent Violation) # Bbls	Bonus	Overcharges	Cum. Overcharges
1902656.51	1902656.51	6.4148	12205160.98	465662300.55
1902656.50	1902656.50	6.4546	12280886.64	477943187.19
1876593.01	1876593.01	6.5043	12205923.91	490149111.10
1939145.00	1939145.00	6.5639	12728353.87	502877464.97
1876593.00	1876593.00	6.6236	12429801.39	515307266.36
1939145.00	1939145.00	6.6634	12921298.79	528228565.15
1939145.00	1939145.00	6.7059	13003712.46	541232277.61
1751485.99	1751485.99	6.7457	11814999.04	553047276.65
1939145.00	1939145.00	6.7854	13157874.48	566205151.13
1876593.00	1876593.00	6.8311	12819194.44	579024345.57
1939145.00	1939145.00	6.8724	13326580.10	592350925.67

APPENDIX I—Continued

OPERATOR: Exxon Company, USA
PROPERTY NAME: Hawkins Field Unit
COUNTY AND STATE: Wood County, Texas

Date	BPCL	Total Sales	Cumulative Deficiency	Allowable Sales Upper Tier/ Exempt	Actual Sales Upper Tier/ Exempt
	(Bbls)	(Bbls)	(Bbls)	(Bbls)	(Bbls)
6/79	1869154.20	1862155.27	0.00	0.00	1862155.27
				0.00	0.00
7/79	1899622.09	1823531.79	0.00	0.00	1823531.59
				0.00	0.00
8/79	1867784.85	1909925.56	0.00	42140.71	1909925.00
				0.00	0.00
9/79	1776723.49	1872859.91	0.00	96136.42	1872859.91
				0.00	0.00
10/79	1804110.36	1893769.72	0.00	89659.36	1893769.72
				0.00	0.00
11/79	1715103.03	1762225.53	0.00	47122.50	1762140.00
				0.00	0.00
12/79	1740435.88	1953014.64	0.00	212578.76	1939145.00
				0.00	0.00
1/80	1676761.40	1936779.21	0.00	248056.99	1842173.89
				11960.82	94605.32
2/80	1456981.73	1720285.62	0.00	239079.93	1557111.00
				24223.96	163175.00
3/80	1549412.43	1833881.61	0.00	245212.43	1575824.61
				39256.75	256057.00
4/80	1437810.92	1747684.06	0.00	252856.48	1421546.00
				57016.66	326138.00
5/80	1422063.46	1748171.65	0.00	251103.31	1341643.00
				75004.88	406529.00
6/80	1314569.98	1673328.45	0.00	259741.13	1207353.00
				99017.34	465854.00
7/80	1294714.50	1612948.08	0.00	215762.37	1089171.88
				102471.21	523047.91
8/80	1231040.01	1571949.90	0.00	215455.05	989276.34
				125454.84	581618.29
9/80	1129708.58	1431329.42	0.00	176749.81	834074.76
				124871.03	594855.89
10/80	1103691.05	1491141.30	0.00	209223.13	802267.00
				178227.12	689191.00
11/80	1006467.64	1501186.31	0.00	244391.02	738666.00
				250327.65	762202.98
12/80	976342.08	1415902.14	0.00	196922.91	631735.00
				242637.15	784167.00
1/81	912667.60	1412823.77	0.00	201062.76	492647.00
				299093.39	478234.55

TOTAL OVERCHARGE (this exhibit)

CUMULATIVE OVERCHARGE

APPENDIX I—Continued

PURCHASER: Exxon Company, USA
FIELD: Hawkins

Sales In Violation			Cumulative
Quantity	Bonus	Overcharge	Overcharge
(Bbls)	($Bbl)	($)	($)
1862155.27	6.9378	12919260.83	
0.00	0.0000	0.00	12919260.83
1823531.59	6.9935	12752868.17	
0.00	0.0000	0.00	25672129.00
1867784.29	7.0493	13166571.80	
0.00	0.0000	0.00	38838700.80
1776723.49	7.1160	12643164.35	
0.00	0.0000	0.00	51481865.15
1804110.36	7.1767	12947558.82	
0.00	0.0000	0.00	64429423.97
1715017.50	7.2447	12424787.28	
0.00	0.0000	0.00	76854211.25
1726566.24	7.3115	12623789.06	
0.00	0.0000	0.00	89478000.31
1594116.90	7.2994	11636096.90	
82644.50	29.1788	2411467.34	103525564.55
1318031.07	7.3400	9674348.05	
138951.04	29.2600	4065707.43	117265620.03
1330612.18	7.4000	9846530.13	
218800.25	29.2200	6393343.31	133505493.47
1168689.52	7.4000	8718423.82	
269121.34	29.1800	7852960.70	150076877.99
1090539.69	7.5100	8189953.07	
331524.12	29.1300	9657297.62	167924128.68
947811.87	7.5700	7173421.86	
366836.00	29.0800	10667610.07	185765160.61
873409.51	7.6300	6664114.56	
420576.70	29.0300	12209341.60	204638616.77
773821.29	7.6902	5950840.48	
456368.45	27.9810	12769505.69	223358962.94
657324.95	7.7501	5094334.09	
469984.66	27.1574	12763566.84	241216863.67
593043.87	7.8100	4631672.62	
510963.86	26.8600	13724489.82	259573026.31
494274.98	7.8800	3894886.84	
511875.33	26.8000	13718256.84	277186171.99
434812.09	7.9500	3456756.12	
541529.85	27.7500	15027453.34	295670381.45
291584.22	8.0200	2338505.44	
179141.16	28.7000	5141351.29	303150238.18
			303150238.18
			895501163.85

APPENDIX II

The DOE schedule for the computation of interest on overcharges, reprinted in 46 Fed.Reg. 21,412; 21,414 (1981) provides that interest should be computed:

> (1) At a rate of seven percent simple interest per annum prior to October 10, 1974;
>
> (2) At a rate of nine percent simple interest per annum between October 10, 1974 and September 30, 1979; and
>
> (3) a. At an average prime rate for each calendar quarter on or after October 1, 1979. The applicable average prime rate for each calendar quarter shall be the arithmetic mean, to the nearest one-hundredth of one percent, of the prime rate value published in the Federal Reserve Bulletin for the fourth, third, and second months preceding the first month of the calendar quarter.
>
> b. The interest paid under clause (3) a. should be compounded quarterly.
>
> c. . . .
>
> As applicable, interest should be computed from the date of the violation to the effective restitution date although where it is practically impossible to determine the specific date upon which a violation commenced, it may be necessary, for the purpose of computing interest, to treat all violations in a given month as having occurred on the last day of that month.

Under the above formula, the rates applicable to Exxon's Hawkins Field overcharges are:

Period	Rate (Percent)
January 1, 1975 to September 30, 1979	9.00 percent
October through December 1979	11.70
January through March 1980	14.28
April through June 1980	15.39
July through September 1980	18.22
October through December 1980	11.74
January through March 1981	14.03
April through June 1981	19.98
July through September 1981	18.27
October through December 1981	20.31
January through March 1982	18.46
April through June 1983	16.0[illegible]
July 1982 through date of effective restitution, adjusted quarterly in accordance with the above formula	

APPENDIX C

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Nos. DC-91 through DC-100
(consolidated)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
and

STATES OF ALABAMA, ARKANSAS, CALIFORNIA, *et al.*,
Intervenors-Appellees,
v.

EXXON CORPORATION,
Defendant-Appellant (No. DC-93)

NATIONAL OIL JOBBERS COUNCIL and the JOBBERS GROUP,
Intervenors-Appellants (No. DC-91)

GLADIEUX REFINERY, INC., and
U.S. OIL AND REFINING COMPANY,
Intervenors-Appellants (No. DC-92)

INDICATED REFINERS, Champlin Petroleum Company,
Ashland Oil, Inc., Tenneco Oil Company,
American Independent Refiners Association,
Pennzoil Company, and Texas City Refining, Inc.,
Intervenors-Appellants (No. DC-94)

GASOLINE RETAILERS, Luther Griffin, t/a Palmer
Highway Exxon, Edward McGovern, t/a Maple
Avenue Exxon, Anthony Monaco, t/a Milltown
Exxon Servicecenter, Inc., Donald E. Skilling,
t/a Edon Service Corp., Tex Shipley,
t/a Shipley's Standard Service,
Intervenors-Appellants (No. DC-95)

TOSCO CORPORATION,
Intervenor-Appellant (DC-96)

PHILADELPHIA ELECTRIC COMPANY,
Intervenor-Appellant (DC-97)

AIR TRANSPORT ASSOCIATION OF AMERICA,
Intervenor-Appellant (DC-98)

GERALDINE H. SWEENEY, RJG CAB, INC.,
NATIONAL FREIGHT, INC.,
Intervenors-Appellants (DC-99)

MARATHON PETROLEUM COMPANY,
MOBIL OIL CORPORATION, and
MURPHY OIL CORPORATION,
Intervenors-Appellants (DC-100)

(District Court No. 78-1035)

Before: BECKER, BROWN and MAXWELL, Judges.

ORDER DENYING PETITIONS FOR REHEARING AND/OR SUGGESTIONS FOR REHEARING EN BANC

Upon consideration of Appellant's and Intervenors-Appellants' Petitions for Rehearing and/or Suggestions for Rehearing *En Banc*, it is hereby

ORDERED that said Petitions for Rehearing are DENIED.

It is FURTHER ORDERED that the Suggestions for Rehearing *En Banc* are DENIED.

The mandate shall be issued on Thursday, August 22, 1985.

FOR THE COURT:

/s/ Donna M. Bold
DONNA M. BOLD
Clerk

August 15, 1985

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 78-1035

UNITED STATES OF AMERICA,
Plaintiff,

v.

EXXON CORPORATION,
Defendant.

Nov. 16, 1981.

MEMORANDUM OPINION

FLANNERY, District Judge.

I. *Introduction*

The government ("DOE") initiated this suit to recoup overcharges in the sale of oil allegedly caused by Exxon as the operator of the Hawkins Field Unit. In August, 1980, Exxon filed this motion to dismiss, arguing that working interest and royalty owners of various tracts in the Field Unit are indispensable parties under Rule 19 of the Federal Rules of Civil Procedure. Because the court cannot obtain personal jurisdiction over most of the interest owners, Exxon maintains, the suit should be dismissed in toto, or, at a minimum, the court should limit the suit to those overcharges actually retained by Exxon. By an order of October 9, 1980, the court held Exxon's

motion in abeyance pending resolution by the Temporary Emergency Court of Appeals ("TECA") in *Sauder v. DOE*, in which the district court held the agency could collect from the principal owner and operator of various properties, the entire overcharges of all oil produced from the properties. On April 24, 1981, the TECA affirmed the lower court's decision. 648 F.2d 1341. For the reasons expressed below, Exxon's motion to dismiss is denied.

Factual Background

There are over 300 working interest owners who lease tracts in the Hawkins Field Unit, in addition to 2,200 royalty interest owners. In 1975, the leases in the Field Unit were unitized, i.e., became subject to a comprehensive recovery operation pursuant to a Unit Agreement ("UA"). The UA provides for a sharing of costs and returns from the production of oil from the field. The leaseholders also signed a Unit Operating Agreement ("UOA") with Exxon, the unit operator, which provides that Exxon will initially pay all unit expenses and will then be reimbursed for such expenses (Article 11.1, 1.17). The UOA also contains a specific provision concerning potential litigation involving unit operations. If litigation involves over $10,000, working interest owners shall assume handling of the suit unless authority is delegated to Exxon. If such delegation occurs, all costs incurred with respect to the handling or settling of the suit is an expense Exxon is entitled to be reimbursed for. In this case, both parties apparently agree that the other interest owners in the Hawkins Field Unit have *not* delegated to Exxon the authority to conduct litigation unilaterally.

In addition to being the Unit Operator of the field (actually conducting physical operations in the Unit), Exxon admits to being a 66 percent owner of the production from the unit. Thus, with respect to two-thirds of the oil, any overcharges that occurred have indisputably

wound up in Exxon's pocket. With regard to the final one-third of the oil produced, it is quite unclear what Exxon's precise relationship is with the other working interests in the field. Exxon contends that it simply purchases most of the remaining oil from other interest owners (making Exxon the consumer of a total of 93.6% of the oil produced from the Field Unit), and that there is no relationship at all between Exxon's position as field unit operator and its marketing operations with regard to oil it does not explicity own. More importantly, Exxon rejects any contention that it has sold oil for the other interest owners, except for "miniscule" quantities that are unclaimed by "delinquent" owners. Under the UOA, Exxon suggests, the other interest owners take their share of unit production in kind (that is, in oil) and sell that share of unit production completely independently. Thus, Exxon maintains, if overcharges have occurred with respect to the oil it does not own, it has been the victim of those overcharges and not the culprit. When Exxon purchased the oil from other interest owners, it was compelled to pay an excessive price and it had no relationship to the marketing decision of the other owners in pricing the oil in the first place.

The government has an entirely different view of Exxon's relationship to the oil it does not actually own. The government maintains that the other interest owners with the exception of Texaco (a five percent interest owner) have, in fact, not taken their oil in kind and independently sold it to Exxon, but have instead allowed Exxon to retain the oil and sell it directly to other interests for a particular fee. According to this interpretation, the marketing practices of Exxon and its role as Field Unit operator are intricately linked: because Exxon is the unit operator it retains complete control over *all* the oil produced from the Field Unit (with the exception of Texaco's interest), establishes the price for *all* the oil produced from the Field Unit and essentially sells that oil for the other interest owners.

II. *History of This and Other Relevant Litigation*

On January 10, 1978, the DOE issued a Notice of Probable Violation to Exxon, charging pricing violations in the sale of Hawkins Field Unit crude oil since 1975. The DOE alleged that Exxon, as operator of the Hawkins Field Unit, improperly characterized the unit's production as "new" oil and, therefore, the posted price for the unit exceeded the maximum allowable price under the regulations then in effect. On April 11, 1978, Exxon and several royalty interest owners filed suit in the Northern District of Texas, seeking declaratory relief on the same issues raised in the DOE's enforcement proceeding.

The United States filed this action in June, 1978, seeking to hold Exxon fully liable for all overcharges on oil sold from the Hawkins Field Unit. In June, 1979, Exxon's declaratory judgment action was transferred from the Northern District of Texas to the District of Columbia where this action was pending. *Exxon Corp. v. DOE*, No. CA-3-78-0420-D, slip op. at 4-5 (June 1, 1979). In August, 1979, Exxon and its co-plaintiffs filed notices of dismissal of the declaratory judgment action; on October 16, 1979, this court dismissed the action without prejudice.

Another suit was filed, *Jarvis Christian College v. Exxon*, in Texas state court against Exxon to recover royalty payments withheld by Exxon in anticipation of its being compelled to return overcharges in this suit. Exxon removed that case to federal court, No. TY-80-432-CA (E.D.Tex.), and attempted to join DOE. In January, 1981, this court enjoined Exxon from proceeding against DOE in the *Jarvis* suit; on appeal, the TECA stayed the *Jarvis* case until this suit is decided. *Exxon Corp. v. United States*, 4 Energy Mgt. (CCH) ¶ 26,310 at 28,446.

As noted, the instant motion to dismiss was filed on August 28, 1980 and held in abeyance by the court's

order of October 9, 1980, pending TECA's resolution of *Sauder v. DOE*. On December 5, 1980, Exxon filed a petition and counterclaim for interpleader and declaratory relief, seeking to interplead the other interest owners in the Field Unit. On February 5, 1981, this court stated that it would also await TECA's decision in *Sauder*, as well as resolution of the motion to dismiss, before ruling on the petition for interpleader.

III. *Discussion*

Exxon's motion to dismiss is based on its claim that all interest holders in the Hawkins Field Unit are indispensable parties who cannot be joined in this action. Analysis of the joinder issue under Rule 19 must proceed on two levels: (1) whether the interest owners are persons to be joined if feasible under Rule 19(a) and (2) if they are, whether the suit must be dismissed under Rule 19(b) because these owners cannot be made parties.

A. *Are the Other Interest Owners Parties to be Joined if Feasible?*

Exxon argues that this suit will determine the propriety of selling prices and practices of all the over 2,200 interest owners in the Hawkins Field Unit and, therefore, all of the interest owners will be vitally impacted by the outcome of the litigation and should be part of any suit brought by DOE. Exxon maintains, therefore, that under Rule 19(a)(2)(i), the other interest owners' ability to protect their interests will, as a practical matter, be impeded or impaired by the continuation of this suit in their absence.

In the alternative, Exxon contends that it will be exposed to potential multiple liability under Rule 19(a)(2)(i) because it may be held liable for overcharges which are actually held by other interest owners. Exxon relies in this regard on its contention that it actually was the victim of overcharges because it purchased the

oil from the other owners and did not participate in pricing decisions with respect to this oil. If Exxon is *not* able to achieve reimbursement from those other interest owners, the company will be exposed to multiple liability for overcharges it was not responsible for in the first place.

In addition, Exxon argues that the interest owners should be joined under Rule 19(a)(1) which provides for joinder of a party if "in his absence, complete relief cannot be accorded among those already parties." Exxon again emphasizes that it is in no way responsible for the overcharges on oil it did not own but purchased from other interest owners. Because it has not agreed to represent the other unit owners in this suit, the relief sought by the government, complete restitution of the overcharges, cannot be accorded in this suit. Thus, Exxon concludes, under Rule 19(a)(1) and both prongs of Rule 19(a)(2), the unit owners are parties to be joined if feasible.

The United States' opposition emphasizes two recent judicial decisions by TECA, one in *Sauder v. DOE*, 648 F.2d 1341, and one an interlocutory appeal from this case, *Exxon Corp. v. United States*, 4 Energy Mgt. (CCH) ¶ 26,319 at 28,446.

1) *Sauder v. DOE*

In *Sauder*, the plaintiff was part owner and operator of three oil leases. The TECA affirmed an order by DOE and holding of the district court that the plaintiff had illegally claimed a stripper well exemption to the ceiling price for crude oil and could be held individually liable for the full amount of the overcharges. The court stressed that plaintiff's ownership share (ranging from 34% to 41%) was "by far the largest single holding," and that plaintiff was the sole operator of the leases. 648 F.2d at 1347. The court also emphasized that it was plaintiff who certified to purchasers that the oil was subject to

the stripper exemption and thus "it can fairly be said that it was he who caused the overcharges." The court concluded that given the circumstances of the case "we think it is within the authority and discretion of the agency to hold the owner-operator of a lease liable for the full amount of the overcharge." 648 F.2d at 1348.

The government contends that *Sauder* is virtually indistinguishable from the instant case and compels rejection of Exxon's contention that complete relief cannot be accorded among those already parties. The government interprets *Sauder* as authorizing suits holding the principal owner and operator of oil producing property solely liable for overcharges on the oil produced. The United States maintains that Exxon falls within the contours of the *Sauder* decision because it owns two-thirds of the leases in the Hawkins Field Unit and is the principal operator of the unit. The government concludes that, as in *Sauder*, it is within the discretion of the agency to charge Exxon with the full amount of the overcharges involved in this case; therefore, the other interest owners are not parties that should be joined if feasible under Rule 19(a).

Exxon, however, argues that *Sauder* does not control the disposition of the instant motion. First, according to Exxon's interpretation, TECA upheld DOE's use of a flexible administrative remedy to "restore the status quo" by compelling the principal owner-operator to furnish restitution to the party aggrieved by overcharges. In contrast, Exxon suggests, this suit does not involve review of an exercise of administrative discretion in employing flexible administrative procedures. Instead, the government has forfeited the broad deference owed its administrative processes by proceeding directly to court and seeking immediate judicial consideration of its overcharging allegations.

This distinction between *Sauder* and the instant suit is insignificant. There is nothing in *Sauder* which would

suggest that the TECA would differentiate between administrative orders directing that restitution be paid and judicial enforcement actions attempting to achieve recovery of overcharges by the United States government. TECA's critical focus is on whether it is within the discretion of the agency to proceed against the principal owner-operator as a "means to repair infraction of its pricing rules." 648 F.2d at 1348. That this is so is revealed by the court's reliance on the determination in *Tenneco Oil v. FPC*, 442 F.2d 489, 497 (5th Cir. 1971) that holding "the central figure" wholly responsible for refunding overcharges is necessary to "effective enforcement" of equitable pricing regulations. 648 F.2d at 1348.

If the government can ultimately persuade the court that holding Exxon liable for the entire amount of the overcharges is necessary to the effective enforcement of the Emergency Petroleum Allocation Act, then the court must conclude that this suit, directed at Exxon alone, is within DOE's enforcement discretion. That the government has brought an enforcement action in federal court instead of proceeding through more "flexible" administrative channels is not a relevant factor in whether Exxon can be held solely liable for the overcharges and, thorefore, whether joinder is desirable.[1]

The preceding discussion reveals that there is no significant distinction between *Sauder* and the instant case based simply on the *forum* DOE has chosen for attempting to recoup overcharges on oil produced from the Hawkins Field Unit. A much more substantial distinction may exist with respect to whether Exxon can be

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[1] If the government's decision to prosecute this case in federal court is somehow pertinent to the question at hand, it is worth recalling that the agency was preparing to proceed against Exxon administratively until Exxon filed its declaratory judgment action against the DOE in Texas. Exxon cannot on the one hand deliberately choose a judicial forum and on the other complain about the lack of flexible administrative mechanisms.

held liable in any forum for all of the overcharges on oil sold. As noted, the TECA, in *Sauder*, stressed that the owner-operator had "caused the overcharges" by certifying that all the oil sold was stripper well oil. In this case, Exxon maintains, there is no evidence it has "caused" the overcharges of oil sold by the other interest owners. In fact, Exxon contends, since Exxon is really the victim of marketing decisions made completely independently, it would be totally inconsistent with *Sauder* for the court to compel Exxon to pay restitution for overcharges on oil it did not own.

Whether this dictinction acticulated by Exxon in fact exists turns on which party's characterization of the marketing practices at the Hawkins Field Unit is correct. Exxon contends that the marketing decisions of the other interest owners are made completely autonomously and, therefore, Exxon cannot be said to be responsible for the overcharges in any way. The government's characterization of the marketing of oil at the field unit is dramatically different. DOE insists that Exxon, in effect, sold oil for the other interest owners and directly set the price for all oil produced from the field unit. In the alternative, the government suggests, Exxon, as principal owner and operator of the unit, somehow influenced the representations of all interest owners that the oil produced from the unit was "new" and not "old" oil. Therefore, the government concludes, Exxon was the "animating force" behind all of the overcharges sought in this suit.

It would be premature for the court to attempt to ascertain, at this time, which of the parties' marketing scenarios more closely approximates reality. As the government notes, future discovery will surely divulge information bearing upon precisely how marketing decisions at the field unit were made. At this point, it is sufficient for the court to note that Exxon can only be held liable for overcharges which the government can

document Exxon in some way "caused." If the United States cannot ultimately prove Exxon was responsible for the overcharges on oil it did not own, the court will not order that Exxon pay restitution with respect to this oil. If the government can establish that Exxon "caused" all the overcharges on oil produced from the field, either by directly selling the oil for the other interest owners or by being the "animating force" behind all the pricing decisions made in the unit, then this suit will be virtually indistinguishable from *Sauder*, and TECA's ruling in that case will be controlling precedent here.

Thus, while it is presently unclear whether the United States will ultimately succeed in its efforts to prove Exxon caused all of the overcharges, the analysis in *Sauder* compels rejection of Exxon's instant motion to dismiss based on inability to join necessary parties. Under Rule 19(a)(1) "complete relief" can be accorded among existing parties since such relief in this case is definitionally that which can be legitimately exacted from Exxon by the United States. Under the formulation in *Sauder*, which this court must follow, there is no risk that the court will ultimately authorize recovery of overcharges from Exxon which Exxon is not somehow responsible for. If the government fails to sustain its burden of proving that Exxon caused the overcharges with regard to oil it did not own, then no relief will be furnished by the court to the government with respect to those overcharges. If the government can prove that Exxon caused all the overcharges then *Sauder* authorizes the court to grant to the government all the relief it requested. In either event, the "complete relief" warranted by the government's proof will be accorded by the court at the culmination of the suit. *See, e.g., Ramsey v. Bomin Testing, Inc.*, 68 F.R.D. 335, 338 (W.D. Okl.1975); *Bloch v. Sun Oil Corp.*, 335 F.Supp. 190, 196 (W.D.Okl.1971).

This treatment of *Sauder* also suggests that the alternative requirements of Rule 19(a)(2) cannot be estab-

lished by Exxon. Under Rule 19(a)(2)(ii), Exxon cannot be exposed to a risk of "multiple liability" because it will only be held liable once for those overcharges which it has actually been responsible for. The fact that the overcharges themselves may have wound up "in the pockets" of other interest owners is irrelevant under *Sauder's* formulation. As long as the principal owner-operator caused the overcharges, *Sauder* allows complete recovery from that party, regardless of whether it is actually in possession of the monies received pursuant to the overcharges.

Similarly, under Rule 19(a)(2)(i), the court's analysis of *Sauder* means that the interests of other unit owners in this case will not, as a practical matter, be impeded. The court's ultimate disposition of the case will find Exxon liable for those overcharges which Exxon has caused; the decision will not rule upon the actions of other interest owners and, therefore, could not be employed as precedent to hold them liable in the future. That Exxon may attempt to seek indemnification or contribution from the other interest owners for part of the overcharges the court determines Exxon has been responsible for does not alter the court's conclusion. Such a suit by Exxon would turn upon the specific reimbursement agreements entered into by the parties, agreements not at all at issue in the instant case. Furthermore, if the disposition of this case has any effect upon a subsequent reimbursement suit by Exxon, it may be to *assist* the other interest owners. A finding by the court that Exxon could be found *solely* responsible for all overcharges could arguably aid other interest owners in defending against a suit for contribution or indemnification. Thus, the court's interpretation of *Sauder* compels the conclusion that none of the alternative prongs of Rule 19(a) can be satisfied here and, therefore, the other interest owners are not parties that should be joined in this dispute.

United States v. Exxon

TECA's consideration of an interlocutory appeal from this case, *United States v. Exxon*, 4 Energy Mgt. (CCH) ¶ 26,319 at 28,446, strongly supports the conclusion that the other interest owners are not indispensable parties to this controversy. The TECA expressly directed the parties to address the question of whether the *Jarvis* plaintiffs and other interest owners "should be joined under Rule 19." ¶ 26,319 at 28,450. Following consideration of the parties' argument on the joinder issue, the TECA did *not* hold that joinder should occur. Rather, the court determined that "the Jarvis plaintiffs and other interest owners should be permitted to intervene in the action if they wish to do so." ¶ 26,319 at 28,451.

That the TECA was making a deliberate determination that joinder is *not* required in this case is revealed by language in the decision stressing the broad scope of TECA's review, and the importance of expediting the current litigation. The court noted its concern that three years have elapsed since the DOE filed this suit and that two interlocutory appeals have already been taken on "procedural grounds." ¶ 26,319 at 28,450-51. Further, the court stressed that it could employ its "extraordinary" authority under 28 U.S.C. § 1651 to "avoid waste of judicial time and resources." ¶ 26,319 at 28,451. It stretches the imagination to believe that TECA, fully aware of Exxon's position on the joinder of other parties and overtly interested in bringing this case to a substantive resolution, blithely sidestepped the joinder issue. It is obviously much more likely that the TECA's ruling on intervention represents the court's final and definitive decision as to how the inclusion of the other interest owners should be handled in this case.

To avoid this seemingly inevitable conclusion, Exxon advances two arguments. First, Exxon maintains that TECA's ruling on intervention was based on application of the standard for intervention of right in Rule 24(a)

of the Federal Rules of Civil Procedure. Since the standard for intervention of right is substantially similar to the standard for joinder under Rule 19 TECA's ruling, in fact, supports the joinder of other interest holders in this case. The flaw in this syllogism is its underlying assumption that TECA applied the standard for intervention of right. That this was not so is evidenced by the court's declaration that interest owners should be "permitted" to intervene if they wish to do so. This language appears far more consistent with the assumption that TECA was applying the standard for permissive intervention, particularly in light of the preceding discussion on TECA's awareness of the joinder issue and desire to expedite this litigation.

Second, Exxon maintains that TECA expressly declined to decide the issue of whether the other interest owners are indispensable parties to this litigation. In support of this contention, Exxon refers to a footnote in the opinion which states that one of the "legal" questions not currently before the court is whether "Exxon can be held liable for all overcharges." ¶ 26,319 at 28,452 n.3. This language does not in any way imply that the TECA was refraining from deciding the joinder issue. Rather, its notation that the issue of whether Exxon can be held solely liable for all overcharges is not ripe is completely consistent with this court's analysis of *Sauder*. If it is ultimately determined that Exxon caused the overcharges, it can be held solely liable for the amount of the overcharges. If the government cannot establish that Exxon caused the overcharges, then it will not be held liable for the overcharges. In either case, the other interest owners are not parties that are indispensable to this litigation. TECA's acknowledgement that it is premature to decide the "legal" question of Exxon's eventual liability for overcharges on all field unit oil buttresses the conclusion that the other interest owners are not parties that should be joined to this dispute between Exxon and the United States government.

B. *Should the Court in Equity and Good Conscience Dismiss this Action if the Other Interest Owners are Parties that Should be Joined*

Rule 19(b) does not mandate dismissal of an action even if parties should be joined under Rule 19(a). Dismissal is essentially discretionary; the court's focus is on the following equitable factors: (1) to what extent a judgment rendered in the party's absence might be prejudicial to him or those already parties; (2) the extent to which, by the shaping of relief, prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Even if the court were to conclude that the other interest owners are parties that should be joined under Rule 19(a), consideration of these equitable factors would prevent the court from dismissing this action.

In considering the first factor, it is significant that TECA has extended to the other interest owners an opportunity to intervene in this litigation; it is within these owners' power to protect any interest they may have in this litigation. *See Provident Tradesmens Bank & Trust Co., v. Patterson*, 390 U.S. 102, 114, 88 S.Ct. 733, 740, 19 L.Ed.2d 936 (1968). Moreover, the TECA noted that the *Jarvis* interest owners expressly represented before that tribunal that they do not consider themselves indispensable parties to this litigation. ¶ 26,319 at 28,450. Thus, it is clear that the other interest owners will not be prejudiced significantly, if at all, by not being joined to this action.

The second equitable factor, the extent to which the shaping of relief can lessen prejudice, has already been discussed in detail. The fact that the court will only hold Exxon liable for overcharges it has in some way caused represents a shaping of relief that will essentially eliminate potential prejudice to Exxon or other

interest owners. This judicial course of action also bears upon the third equitable consideration. Since Exxon will only be required to pay restitution for overcharges which *Sauder* provides it can be held accountable for, any judgment rendered by this court will be adequate regardless of the other interest owners' participation in this suit.

With respect to the fourth equitable factor, it is unclear whether dismissal of this action would leave DOE with an adequate remedy in federal court in Texas. The over 2,200 other interest owners are apparently located throughout the country. It is purely a matter of conjecture whether the Texas long-arm statute would enable the government to attain jurisdiction over all of the parties Exxon contends are indispensable to this suit. Therefore, an overall weighing of the four equitable considerations enumerated in Rule 19(b) clearly favors non-dismissal of this suit.

Conclusion

The TECA's recent decisions in *Sauder v. United States* and *United States v. Exxon*, indicate that the other working interest and royalty owners in the Hawkins Field Unit are not parties that should be joined if feasible under Rule 19(a). Even if these owners are parties that should be joined, consideration of the equitable factors delineated in Rule 19(b) demonstrates that this suit should not be dismissed. Thus, Exxon's motion to dismiss is denied.

APPENDIX E

TEMPORARY EMERGENCY COURT OF APPEALS

Nos. DC-85, 5-59

EXXON CORPORATION,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee,

UNITED STATES DEPARTMENT OF ENERGY,
Third Party
Defendant-Petitioner,

v.

JARVIS CHRISTIAN COLLEGE, THE MEREDITH FOUNDATION, NORMA RUTHERFORD and FRANK MORRISON, JR.,
Plaintiffs-Respondents,

and

EXXON CORPORATION,
Defendant-Respondent.

Argued May 18, 1981

Decided June 30, 1981

As Amended July 20, 1981

Before INGRAHAM, JAMESON and ZIRPOLI, Judges.

JAMESON, Judge.

This appeal involves the accommodation of two related actions in which Exxon is a defendant, and which pose the threat of conflicting decisions on identical issues. Exxon appeals from a preliminary injunction issued by the District Court for the District of Columbia in *United States of America v. Exxon Corporation*, ("D.C. Action"), ordering Exxon to dismiss its "Counterclaim, Joinder and Third Party Action" filed in *Jarvis Christian College, et al. v. Exxon Corporation* in the Eastern District of Texas, Tyler Division ("*Jarvis*"), "insofar as . . . [it] purports to state claims against the Department of Energy" (DOE). The injunction also orders Exxon to refrain from litigating in any other forum the issues involved in the D.C. action.

Following the entry of an order of this court staying the preliminary injunction in the D.C. action, the DOE petitioned the court to issue a supervisory writ to the Texas court staying proceedings in the *Jarvis* action until the appeal from the injunction in the D.C. court was decided. A stay was granted pending further order of this court.

It is undisputed that the D.C. action and *Jarvis* action involve duplicative litigation with respect to pricing regulations of the DOE. This court is now confronted with the problem of determining the proper forum for deciding the pricing issues, while assuring that all parties in both the D.C. and *Jarvis* actions will be bound by the decision. Since we resolve this dilemma by exercising our supervisory powers, we do not reach the specific questions raised by Exxon's appeal relating to comity and the propriety of injunctive relief.[1] By so doing, we heed

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[1] This court's power to supervise the litigation of the pricing issues derives from 28 U.S.C. § 1651(a), which provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate

our statutory duty to "exercise [our] powers . . . in such manner as to expedite the determination of cases over which [we] have jurisdiction . . . ." ESA § 211(b)(1), 12 U.S.C. § 1904 note.

Factual and Procedural Background [2]

Exxon is the United Operator of the Hawkins Field Unit ("HFU"), a unitized property in Texas comprised of more than 200 crude oil producing leases. Exxon also owns the largest working interest in the HFU and is entitled to about two-thirds of the crude oil produced. There are over 300 working interest owners and about 2,200 royalty or overriding royalty interest owners in the unit.

The other working and royalty interest owners take their share of HFU crude oil in kind and sell to various purchasers, including Exxon. Exxon purchases about 93.6% of the oil produced from the HFU leases, and in turn sells about 21% of the total HFU production, using the remainder in its own refining operations. The 6.4% of HFU oil not purchased by Exxon is sold by other working interest owners to third parties or used in their own refining operations.

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in aid of their respective jurisdictions and agreeable to the usages and principles of law.

This court has "the powers of a circuit court of appeals with respect to the jurisdiction conferred on it" by Congress. § 211 of the Economic Stabilization Act of 1970 (ESA) 12 U.S.C. § 1904 note, as incorporated by 15 U.S.C. § 754(a)(1). In a previous order issued February 9, 1981, we held that we have jurisdiction over the present appeal by virtue of § 211(b)(2) of the ESA, as incorporated and amended, 15 U.S.C. § 751 *et seq.* See also *Hamilton v. Morial*, 644 F.2d 351, 353-54 (5 Cir. 1981).

[2] In resolving the problem now presented to this court as a result of procedural maneuvering by all parties, it is necessary to set forth in some detail proceedings in both the D.C. action and *Jarvis*.

The *Jarvis* plaintiffs own royalty interests in Exxon's holdings. They have division orders with Exxon which allow Exxon to take delivery of the oil to which their royalty interests entitle them in exchange for monthly payment by Exxon of the posted price for HFU oil. Exxon establishes the posted price for the unit.

On January 10, 1978, the DOE issued a Notice of Probable Violation (NOPV) to Exxon, charging pricing violations in the sale of HFU crude since 1975. The DOE alleged that Exxon, as operator of the HFU, improperly characterized much of the unit's production as "new" oil and thus the posted price for the unit exceeded the maximum allowable price under the regulations then in effect. Exxon responded to the NOPV. On April 11, 1978, Exxon and several royalty interest owners filed suit in the Northern District of Texas, seeking declaratory relief on the same issues raised in the DOE's enforcement proceeding.[3]

In June, 1978, the DOE withdrew the NOPV and instituted the D.C. action, seeking to hold Exxon liable for all overcharges on the sale of HFU oil, with the overcharges payable to the United States Treasury. Exxon moved to transfer the D.C. action to the Northern District of Texas. The court denied this motion on August 3, 1978. Exxon also moved to dismiss the D.C. action for lack of subject matter jurisdiction, contending that the Government must exhaust administrative procedures

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[3] The four issues, which are not before us on this appeal, are (1) whether the HFU is a single property or separate leases under 10 C.F.R. § 212.72 of the DOE's Mandatory Petroleum Price Regulations; (2) assuming the HFU is a single property, when a significant alteration in producing patterns occurred, establishing a unit base control level for pricing purposes under 10 C.F.R. § 212.72; (3) whether Exxon can be held liable for all overcharges; and (4) whether overcharges should be paid to the United States Treasury. The second issue is the key factual question to be litigated at trial. The others are legal questions which Exxon disputes.

before bringing an enforcement action in the district court. The court denied Exxon's motion. *United States v. Exxon Corp.*, 470 F.Supp. 674, 675 (D.D.C.1979). This court affirmed that ruling on appeal. *Exxon Corp. v. United States*, 616 F.2d 526, 528 (TECA 1980).

In June, 1979, Exxon's declaratory judgment action was transferred from the Northern District of Texas to the District of Columbia, where the D.C. action was pending. In August, 1979, Exxon and its co-plaintiffs filed notices of dismissal of the declaratory judgment action on the asserted basis that identical issues were raised in the DOE's enforcement action. Believing the notices were ineffective due to a pending motion for a stay, the court entered an order of dismissal without prejudice on October 16, 1979.

Both Exxon and the DOE filed motions to compel discovery, which were largely granted on August 9, 1980. Extensive discovery has been conducted since then. During oral argument, the parties indicated that the final documents should be produced at an early date.

On August 26, 1980, Exxon again moved to dismiss the D.C. action for lack of indispensable parties, namely the other interest owners in the HFU. The court held the motion in abeyance pending this court's decision in *Sauder v. DOE*, 648 F.2d 1341 (Em.App.1981). In December, 1980, Exxon petitioned to interplead the other interest owners and posted a $16,000,000 interpleader bond. The court also withheld ruling on the petition pending the outcome of *Sauder*.[4]

Meanwhile, in October, 1980, Exxon notified HFU royalty owners it would begin withholding 40-45% of its

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[4] *Sauder* involved an operator of a field not covered by a formal unitization agreement. There, as here, the DOE held the operator solely liable for the overcharges, without joining the other interest owners in the enforcement proceeding. The district court affirmed the DOE's remedial order, and this court in turn affirmed on appeal.

payments under its purchase agreements to meet the possible overcharge liability in the D.C. action. In response, the *Jarvis* plaintiffs filed suit in state court in Texas alleging conversion, breach of contract and fiduciary duty. The *Jarvis* plaintiffs maintained that Exxon could not withhold part of their contractual payments unless and until the D.C. court determined the posted price to be unlawful. Exxon removed the case to federal court in the Eastern District of Texas on November 19, 1980. At the same time, Exxon filed an answer to the *Jarvis* complaint and a separate "Counterclaim, Joinder and Third Party Action" against the DOE raising the same issues as are involved in the D.C. action. Exxon asserted that the pricing and regulatory issues must be decided before it can be compelled to pay the contract price for oil purchased from royalty owners. Exxon continues to argue that if the price is held unlawful, then the contract with the royalty owners cannot be enforced.

Exxon withheld part of its payments to the *Jarvis* plaintiffs and other royalty owners for about four months, until President Reagan signed Executive Order No. 12287, decontrolling oil prices, on January 28, 1981. As noted above, the alleged pricing violations had continued for five and one-half years.

The *Jarvis* plaintiffs moved to remand the case to state court on the grounds that there was not complete diversity of citizenship and the federal regulatory issues were not relevant to its tort and contract claims against Exxon. The court declined to remand and set the case on an expedited schedule for trial within ninety days. The court also granted leave to Exxon and the *Jarvis* plaintiffs to implead the DOE, which had not answered Exxon's pleading. The *Jarvis* plaintiffs again tried to sever Exxon's claims against the DOE from their suit by a motion to dismiss or sever the counterclaims against them. The court denied the motions.

Instead of answering Exxon's pleading, or seeking a stay of the *Jarvis* suit by the Texas court, the DOE petitioned the D.C. court for an injunction ordering Exxon to dismiss its pleading in the *Jarvis* case insofar as it raised claims against the DOE, and enjoining Exxon from litigating the pricing and regulatory issues in any other forum than the D.C. action. The D.C. court initially denied the preliminary injunction, but on reconsideration granted it on January 13, 1981. On January 23, 1981, the court modified the injunction in an attempt to allay Exxon's fear that if it filed a notice of dismissal the "two-dismissal" provision of Fed.R.Civ.P. 41(a)(1) would apply and Exxon's compliance with the injunction would operate as an adjudication on the merits of the regulatory issues.

Exxon filed concurrent notices of appeal to the Court of Appeals for the District of Columbia Circuit and this court, with emergency motions for stay pending appeal. The D.C. Circuit denied the stay and expressed no opinion on whether it had jurisdiction over the appeal. This court took jurisdiction on February 9, 1981 and granted Exxon's motion for an emergency stay pending appeal. At that time we also advised the parties that we would "entertain a proper motion or petition filed by any present or future party in the Texas case seeking a stay of the proceedings there."

The DOE promptly requested an emergency stay of the *Jarvis* case pending appeal. On February 13, 1981, we entered an order staying the *Jarvis* proceedings pending further order of this court. The DOE also petitioned for a supervisory writ to govern the *Jarvis* case, as well as filing several motions in the district court in Texas to stay or transfer the case to the District of Columbia. The Texas court has not ruled on any of these motions because of the stay imposed by this court. The *Jarvis* plaintiffs have moved to dissolve the stay of their suit, at least as to their claims, which they continue to argue are separate from the pricing and regulatory issues.

Numerous briefs and voluminous documents have been filed in connection with this appeal and the various motions associated with it. At oral argument we heard from the *Jarvis* plaintiffs as well as Exxon and the DOE concerning, *inter alia*, the propriety of transferring the *Jarvis* suit to the District of Columbia or staying further proceedings in *Jarvis* pending final determination of the D.C. action.

Contentions of Parties

As noted above, we find it unnecessary to consider in detail the contentions of the parties with respect to the propriety of the preliminary injunction.[5] There is no question that the D.C. action and *Jarvis* action both involve the same pricing and regulatory issues. Both Exxon and the DOE invoke principles of comity and judicial self-restraint to argue why their preferred court should decide these issues. Each attacks the procedural approach of the other party. Each purports to promote efficient judicial administration, but there is little evidence of any real effort to cooperate in resolving the procedural prob-

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[5] We note that it is generally appropriate in preventing duplicative litigation for the party objecting to the second suit to first seek relief *in the second court*—here the Texas court—before asking for an injunction from the first court. See *Bergh v. State of Washington*, 535 F.2d 505, 507 (9th Cir. 1976) (dismissal by second court proper if same issues being litigated elsewhere); *Columbia Plaza Corp. v. Security National Bank*, 525 F.2d 620, 623 (D.C. Cir. 1975) (plaintiff sought stay or transfer in second court and writ of mandamus in court of appeals before obtaining injunction); *American Chemical Paint Co. v. Thompson Chemical Corp.*, 244 F.2d 64, 66 (9 Cir. 1957) and *Hinton v. Seaboard Air Line Railway Co.*, 170 F.2d 892, 894 (4 Cir. 1948) (plaintiff first requested stay in second court before seeking injunction). Had the DOE taken that route, and had the Texas court denied relief, we could have acquired jurisdiction in a more orderly fashion. Now we are in the position of trying to bring order to this litigation without the benefit of the Texas district court's ruling.

lem. Rather, both have adopted strategies which have turned the litigation into a procedural maze.

After reading the voluminous briefs, motions and supporting documents, we requested the parties to address four specific questions at oral argument: (1) whether this court should stay the *Jarvis* case pursuant to the DOE's petition for a supervisory writ pending a final determination in the D.C. action; (2) whether we should order the *Jarvis* case transferred for consolidation with the D.C. action; (3) if consolidation is appropriate, whether the parties should be joined under Fed.R.Civ.P. 19, Exxon's interpleader petition, or some other procedure; and (4) whether the decision in *Sauder v. DOE*, *supra*, has any impact on this case. Because the *Jarvis* plaintiffs have a direct interest in these issues, they requested and we granted leave for them to be heard at oral argument. The parties took the following positions on those questions:

Exxon: Exxon reiterated the statement in its brief that it would not oppose either a stay or transfer of the *Jarvis* case, as long as all parties would be bound by the decision on the pricing issue. Exxon stressed the extraordinary nature of a supervisory writ, however, and favored allowing the Texas court to first rule on the DOE's pending motions before this court should exercise supervisory powers.

Exxon questioned whether venue and jurisdiction would be proper in the District of Columbia if the *Jarvis* plaintiffs were to be joined under Rule 19, but noted no such problems would arise in the Texas court. As to the effect of *Sauder*, Exxon sought to distinguish that case from the present controversy on the ground that *Sauder* involved agency discretion to hold an operator liable, and noted that Judge Flannery had not yet exercised any discretion on that issue, so there is none to review. Exxon proposed two alternatives open to this court: (1) dissolve the injunction and stay of the *Jarvis* case, and

allow the Texas court to act on the DOE's motion to transfer; and (2) shape appropriate relief under Rule 19 to limit the DOE's claims against Exxon solely to Exxon's share of alleged overcharges.

DOE: The DOE recognizes this court's power to transfer the *Jarvis* case to the District of Columbia without a specific request, under the authority of the All Writs Act, 28 U.S.C. § 1651. The DOE does not oppose transferring the *Jarvis* case in the event the order granting the preliminary injunction is not affirmed, but urges that the mechanics should be left to the discretion of the district court. The DOE argues that *Sauder* supports the Government's theory of operator liability and makes it clear that the *Jarvis* plaintiffs and other interest owners are not indispensable parties to this litigation.

Jarvis Plaintiffs: The *Jarvis* plaintiffs object to a transfer of their case to the D.C. court, again arguing that it would be inconvenient and unfair to require them to litigate their severable claims in a forum outside Texas. They note also that no party has requested transfer of the case.

The *Jarvis* plaintiffs also contend that Exxon's interpleader petition is improper because Exxon itself created the fund, and in addition, there is not complete diversity of citizenship because the Government is not a citizen. As to the effect of *Sauder*, they agree with the DOE that it refutes Exxon's theory that the other interest owners (including the *Jarvis* plaintiffs) are indispensable parties to the litigation of the regulatory issues. The *Jarvis* plaintiffs urge us to modify the stay of their suit to allow them to proceed on their tort and contract claims in the Texas court, stating they will immediately seek summary judgment as to those issues.

Remedy

Although we do not decide the procedural issues raised by the injunction, it is necessary that we fashion an ap-

propriate remedy to expedite the pending litigation. This is the second interlocutory appeal on procedural grounds, and three years have elapsed since the D.C. action was instituted. The unusual manner in which we acquired jurisdiction over both of the cases, and the numerous motions, petitions, and arguments made to this court in connection with this appeal "permit extraordinary action." See, *e.g.*, *Hamilton v. Morial*, *supra*; *Koehring v. Hyde Constr. Co.*, 382 U.S. 362, 364 (1966). We therefore act under the authority of 28 U.S.C. § 1651, and pursuant to the duty imposed by ESA § 211(b)(1), 12 U.S.C. § 1904 note, to make provision for a resolution of the conflicting jurisdictional claims. To avoid waste of judicial time and resources, prevent duplicative discovery and trials, and eliminate the risk of inconsistent adjudications and races to obtain judgments (see *Columbia Plaza Corp. v. Security Nat. Bank*, *supra*, 525 F.2d at 626), we determine that the pricing and regulatory issues should be decided in one forum.

Considering all of the equitable factors which bear on the choice of forum, we conclude that the pricing and regulatory issues should be determined in the D.C. action. Accordingly we remand the D.C. action to the district court for further proceedings and continue the stay of all proceedings in the *Jarvis* action pending final determination of the D.C. action.[6] We conclude further that the *Jarvis* plaintiffs and other interest owners in the HFU

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[6] Under this disposition the injunction entered in the D.C. action ordering Exxon to dismiss its counterclaim, joinder and third party action in *Jarvis* action is rendered moot. Exxon contends that the injunction against its litigating the same issues in any other forum, however, arguably would prevent Exxon from filing *amicus* briefs in other cases or from defending itself in other DOE enforcement actions. These questions are not now before the court. If Exxon should later be faced with the prospect of being precluded from representing its legitimate interests, it can seek relief from the district court and if necessary, by appeal to this court.

should be permitted to intervene in the D.C. action if they wish to do so.

Under this disposition the final determination in the D.C. action will be binding upon all parties and duplicative litigation with the possibility of conflicting results will be avoided. It appears to the court also that the *Jarvis* plaintiffs will not be prejudiced by this remedy. They are now concerned only with the amounts withheld by Exxon over a four month period. They were paid the full contract price for the prior five years involved in the alleged price violations. At oral argument, counsel for Exxon stated that Exxon will pay the "highest interest applicable" on any amount they may owe the *Jarvis* plaintiffs upon the determination of the D.C. case. If the *Jarvis* plaintiffs desire an earlier determination of their contract and tort claims against Exxon, they may intervene in the D.C. action and move for summary judgment in that action.

IT IS ORDERED THAT:

(1) The District of Columbia action, *United States of America*, Plaintiff v. *Exxon Corporation*, Defendant, Civil Action No. 78-1035, is remanded to the district court for further proceedings;

(2) All proceedings in the action pending in the District Court for the Eastern District of Texas, Tyler Division, *Jarvis Christian College, The Meredith Foundation, Norma Rutherford and Frank Morrison, Jr.*, Plaintiffs v. *Exxon Corporation*, Defendant, and *United States Department of Energy*, Third-Party Defendant, Civil Action No. Ty-80-432, are stayed until final determination of the action in the District Court for the District of Columbia; and

(3) All plaintiffs in the action in the Texas court and all other interest owners in the HFU involved in these actions shall be permitted to intervene in the District of Columbia action if they wish to do so.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1035

UNITED STATES OF AMERICA,
Plaintiff,

v.

EXXON CORPORATION,
Defendant.

[Filed Jan. 16, 1981]

MEMORANDUM AND ORDER

Introduction

This matter comes before the court on plaintiff's (Department of Energy or DOE) motion for reconsideration of this court's denial of plaintiff's motion for a preliminary injunction. Based upon the parties' memoranda, and oral argument held in this matter, this court orally granted DOE's motion, and, at the request of counsel for defendant (Exxon), determined to issue a written order embodying the court's final ruling on this motion. This memorandum explicates the reasons for the accompanying Order.

For over two years, a suit has been progressing in this court, in which the United States seeks to hold Exxon liable to the U.S. Treasury for alleged overcharges on crude oil by Exxon, and by others who own interests in crude oil produced in the Hawkins Field in Texas. Central to this enforcement action are regulatory issues con-

cerning the validity of certain DOE regulations, and DOE interpretations. If the regulations and the DOE interpretations are valid, then Exxon and other interest owners have charged unlawfully high prices for their crude oil.

If the DOE is successful in this enforcement action, and if DOE's theories of restitution of overcharges to the U.S. Treasury, and operator liability for overcharges by all the interest owners, are upheld, Exxon fears that it will be exposed to multiple liability. This multiple liability will arise, Exxon apprehends, in at least the following way, and perhaps in others: Exxon until recently had been buying crude oil from interest owners, at prices which the DOE claims included an unlawful overcharge; if DOE wins this enforcement action, then Exxon must turn around and pay the amount of the overcharges to the U.S. Treasury.

In an attempt to mitigate this potential liability, Exxon began withholding from the interest owners from whom it purchases crude oil an amount approximating the alleged overcharges. This action by Exxon has precipitated a lawsuit, currently in federal court in Texas, *Jarvis Christian College v. Exxon*, Civil Action TY-80-432-CA. The plaintiffs in *Jarvis*, interest owners in the Hawkins Field, brought this suit in state court, alleging what appear to be state law grounds for recovery from Exxon. Exxon removed the case to the federal court. After removal, Exxon filed a "Counterclaim, Joinder and Third Party Action" against both the *Jarvis* plaintiffs, and the DOE. This pleading purports to raise the same regulatory issues as are currently pending before this court in this enforcement action.

DOE has moved this court to enjoin Exxon from litigating against DOE in any case other than this enforcement action the regulatory issues raised in this enforcement action, and to order Exxon to file a notice of dismissal of its Counterclaim, Joinder and Third Party Ac-

tion in *Jarvis*. The court had originally denied DOE's motion, on December 19, 1980. Upon reconsideration of the questions raised by the DOE's motion, the court is of the opinion that the requested Order should issue.

In denying DOE's motion originally, this court declined DOE's invitation to rely on the standard applied in *Columbia Plaza Corp. v. Security National Bank*, 525 F.2d 620 (D.C. Cir. 1975). This court distinguished *Columbia Plaza* on the grounds that, unlike the situation there, granting DOE's motion "would effectively prevent Exxon from defending itself in *Jarvis*." Memorandum of December 19, 1980, at 2. Because the court is now of the view that issuance of the requested Order would *not* have this effect, the court finds no reason not to apply the *Columbia Plaza* standard; and based on that standard, an injunction is appropriate here.

The effect of an injunction on Exxon's defense of Jarvis

Based on the complaint filed in *Jarvis*, it does not appear that the regulatory issues are legally relevant to the state law bases of the plaintiffs' claims. While Exxon disputes the *Jarvis* plaintiffs' characterization of the issues presented in *Jarvis*, and the federal judge presiding over *Jarvis* has apparently accepted Exxon's characterization, it appears to this court that the *Jarvis* plaintiffs simply seek a declaration of their rights under state law, both contract and tort law, and that the regulatory issues which Exxon seeks to interject in that suit by way of defense are not relevant to that case. However, even if the regulatory issues are properly involved in *Jarvis*, (either because they are part of Exxon's defense, or because of Exxon's counterclaim against the *Jarvis* plaintiffs under section 210 of the Economic Stabilization Act, 12 U.S.C. § 1904 note) Exxon has failed to show why litigation of this question requires that DOE be forced to participate in *Jarvis*.

Exxon has argued that because of the threat of inconsistent liability, arising from the possibility that *Jarvis* could determine that Exxon cannot continue withholding payments, and the possibility that this enforcement action could find Exxon liable to the U.S. Treasury, DOE should be joined in *Jarvis* so that DOE will be bound by any ruling in that case. Exxon has failed to show how, should DOE prevail in this enforcement action, DOE's absence from *Jarvis* would in any manner prevent Exxon from seeking contribution or indemnity from the interest owners. If this or other forms of relief are available to Exxon, (and it does not appear that they are *not* available) then the speculative [1] double liability Exxon fears does not in fact threaten Exxon.[2]

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[1] The potential double liability is *speculative* because it could only arise if Exxon loses both *Jarvis*, and this enforcement action; and because even if Exxon were to lose both suits, Exxon would also have to lose a contribution or indemnity suit or a section 210 suit under the Economic stabilization Act, against the *Jarvis* plaintiffs, before "double liability" would come to rest on Exxon's shoulders.

[2] Exxon had argued in its memorandum in opposition to DOE's motion for a preliminary injunction that if the validity of DOE regulations and interpretations is in issue in a suit, then DOE is an indispensable party in the suit. Exxon relied on two Temporary Emergency Court of Appeals Decisions, *Dyke v. Gulf Oil Corp.*, 601 F.2d 557 (TECA 1979), and *Associated General Contractors of America, Inc. v. Laborers International Union*, 476 F.2d 1407 (TECA 1973). These cases indicate that when courts are considering the mandating or invalidating of agency orders, the agency should be joined in such suits unless there is "equivalent representation or other extraordinary circumstances." *Associated General* at 1388. Exxon has not pursued this line of argument on the motion for reconsideration, and the court therefore need not now determine the relevance of these two cases to this issue. The court notes, however, that it is far from clear that these two cases provide any support for Exxon's position. First, it is doubtful that those cases indicate that DOE should be joined in *Jarvis*, where, as here there is already ongoing litigation, in which DOE is involved, in which the validity of DOE regu-

Application of the Columbia Plaza Standard

Having determined that DOE's absence from *Jarvis* will not preclude Exxon from effectively defending *Jarvis*, this case resolves itself into one governed by *Columbia Plaza Corp. v. Security National Bank*, 525 F.2d 620 (D.C. Cir. 1975). While the instant situation is not on all fours factually with the situation in *Columbia Plaza*, it is, in relevant respects, similar. In both cases, there are two suits, at least parts of which involve similar issues. In both cases, the question is whether prosecution of one of the suits should be enjoined, and, if so, which should be enjoined. Having determined that no reason exists for allowing two suits between Exxon and DOE involving the same regulatory issues to proceed in two federal courts, the court must look to "the convenience of the parties and the courts." *Columbia Plaza, supra*, at 622 n.3. The court is not blindly to apply a "first filed" rule, but rather is to balance "equitable considerations genuinely relevant to the ends of justice." *Id.* at 628 (quoting *Polaroid Corp. v. Casselman*, 213 F. Supp. 379 (S.D.N.Y. 1962)). These factors include whether all parties are before the court, whether witnesses are subject to subpoena power, and, especially relevant here, the extent to which proceedings have progressed in each forum. *Columbia Plaza, supra*, at 628. The court finds that none of these factors weigh in favor of allowing the *Jarvis* case to proceed (to the extent that Exxon seeks to litigate the regulatory issues against DOE), and the last factor, progress of proceedings in each case, weighs heavily in favor of issuing the requested order, so that the

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lations and their interpretation are at issue. Second, even if those cases do indicate that DOE should be joined, it does not appear that DOE's absence from *Jarvis* will preclude Exxon from litigating, as against the *Jarvis* plaintiffs, any regulatory issues Exxon or the *Jarvis* plaintiffs raise.

DOE will have to litigate the regulatory issues only in this enforcement action.[3]

Conclusion

The determination of whether to issue an injunction of course requires the balancing of equitable considerations. Because Exxon has failed to show that the requested injunction would prevent Exxon from defending itself in *Jarvis*, and has failed to indicate any way in which the injunction would otherwise prejudice it, the large burden that denial of the injunction would place on DOE, and the fact that this suit is over two years further along than the *Jarvis* case, require that DOE's motion for reconsideration be granted, and that the injunction which DOE seeks be issued.[4]

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[3] While the court finds that equitable considerations indicate that this injunction is appropriate, the court notes that even if the equitable considerations were in equipoise, the injunction would still be proper. While *Columbia Plaza* counsels against application of the first filed rule as a mechanical matter, that case does indicate that the first filed rule should generally be applied, absent "countervailing equitable considerations." *Id.* at 627.

[4] At oral argument on its motion for reconsideration, DOE orally modified its request, from one seeking a preliminary injunction, to one seeking a permanent injunction. Subsequently, by letter to this court (and to counsel for Exxon) DOE brought to the court's attention *Food Fair Stores v. Square Deal Market Co.*, 187 F.2d 219 (D.C. Cir. 1951). In that case, the district court had permanently enjoined a party to a case before it from prosecuting a similar later filed case, in another district court. On appeal, the court of appeals affirmed the granting of the injunction, but remanded to the district court to modify the injunction, so that it would only be effective "pending the completion of proceedings in the court granting such injunctive relief." *Id.* at 220. The court of appeals reasoned that any protection a permanent injunction might provide that a preliminary injunction would not, would

An appropriate Order accompanies this Memorandum.

/s/ Thomas A. Flannery
United States
District Judge

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be as well provided by the doctrine of res judicata, and that there was therefore no need for a permanent injunction. Inasmuch as the reasoning of *Food Fair* is applicable here, the court will deny DOE's oral motion, and the injunction which issues will be a preliminary injunction, pending the completion of proceedings in this court.

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1035

UNITED STATES OF AMERICA,
Plaintiff,

v.

EXXON CORPORATION,
Defendant.

[Filed Dec. 19, 1980]

MEMORANDUM AND ORDER

This matter comes before the court on plaintiff's motion for a preliminary injunction. Plaintiff seeks an order which (1) enjoins defendant from litigating, against the United States, in any other court, the legal issues involved in the enforcement action, and (2) orders defendant to dismiss its "Counterclaim, Joinder, and Third Party Action" in *Jarvis v. Exxon*, No. TY-80-432-CA (E.D. Tex.). The specific issues which the government seeks to prevent Exxon from litigating in *Jarvis*, or in any other suit, are (1) whether the DOE regulations can be applied retroactively with the interpretation DOE puts on them, so that prices charged constitute illegal overcharges, and (2) if the prices are illegal overcharges, are DOE's theories of "operator liability," and "restitution" to the U.S. Treasury valid.

As a threshold matter, the court must determine the legal standard for issuance of the preliminary injunction plaintiff seeks. The court concludes that *Columbia Plaza Corp. v. Security National Bank*, 525 F.2d 620, 622 n.3 (D.C. Cir. 1975) does *not* provide the legal standard to be applied here. That case, which put primary importance on convenience to the parties and the courts, rather than the more traditional factors, involved a situation where the only matter that would be affected by the grant or denial of the preliminary injunction was the locus of the trial. Therefore, the most important consideration would clearly be which of the two loci would be more convenient for all concerned, considering all attendant circumstances. However, in the instant case, granting the preliminary injunction would effectively prevent Exxon from defending itself in *Jarvis*. Therefore, this case does not present just the relatively simple question of the appropriate location to try a suit. Hence, the *Columbia Plaza* standard is inapplicable, and the court must therefore apply the more traditional analysis of factors, especially injury to plaintiff from denial of the preliminary injunction, and injury to defendant from granting a preliminary injunction.

The court concludes that the injury to defendant far outweighs the injury to plaintiff, and, therefore, the motion must be denied. The injury to Exxon from granting a preliminary injunction is clear; Exxon is left without its major, if not only, defense, in the *Jarvis* case. While DOE intimates that Exxon has provoked the *Jarvis* case, the court declines to so characterize Exxon's actions.

DOE has not pointed to any countervailing injury which denial of the preliminary injunction would cause it. Rather, much of DOE's Memorandum is devoted to pejorative characterizations of Exxon's conduct. DOE does argue in note 4 of its Memorandum that none of the procedural methods by which Exxon is trying to bring DOE into *Jarvis* are applicable. Presumably the

Eastern District of Texas is the appropriate forum for DOE's arguments, and denying the preliminary injunction will not prevent DOE from raising those issues before that court. DOE also argues that requiring it to litigate the same issues in Texas as it has to litigate here is simply wasteful. However, even this "waste" does not outweigh Exxon's need to defend itself in *Jarvis*.

An appropriate Order accompanies this Memorandum.

/s/ Thomas A. Flannery
United States
District Judge

APPENDIX H

TEMPORARY EMERGENCY COURT OF APPEALS

No. DC-75

EXXON CORPORATION,
Defendant-Appellant,
v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

Argued Jan. 24, 1980.

Decided Feb. 26, 1980.

Before MORGAN, PECK, and LACEY, Judges.

MEMORANDUM

PER CURIAM.

This matter is an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b) (1976), Fed. R. App. P. 5, and TECA Rule 1, of an order of the United States District Court for the District of Columbia, denying defendant-appellant's motion to dismiss the amended complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

Plaintiff-appellee invoked the jurisdiction of the court below under section 209 of the Economic Stabilization Act of 1970 (ESA), as amended, 12 U.S.C. § 1904 note (1976), seeking there a judgment against the defendant-appellant for restitution, civil penalties and injunctive

and declaratory relief for alleged violations of the Mandatory Petroleum Price Regulations, 10 C.F.R. §§ 212.1.188 (1978), issued by the Department of Energy (DOE) and its predecessor agencies. Defendant-appellant's motion to dismiss was grounded upon the contention that the district court lacked subject matter jurisdiction over the suit because it was instituted without DOE having first proceeded through what the motion urged is a congressionally mandated "administrative compliance process." Motion to Dismiss, App. 56-57.

Additionally, in its motion the defendant-appellant contended that dismissal of the complaint was required because, by initiating the suit, DOE (1) "violated the procedural safeguards and substantive rights conferred on defendant [appellant] by Ruling 1977-2 and failed to adhere to its administrative procedures regulations", *id.* at 57; and (2) "unjustifiably deviated from a consistent practice and policy of pursuing administrative enforcement", *id.* at 92.[1]

United States District Judge Flannery, in a thoughtful and well-reasoned opinion, App. 357,[2] found no merit to the contentions raised by the defendant-appellant. He was not persuaded by defendant-appellant's argument that Congress, by implication, had repealed a statute which, on its face, obviously admits of no other interpretation than that DOE may institute suit in a United States District Court

> [w]henever it appears . . . that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a viola-

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[1] Defendant-appellant here relied upon *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954).

Ruling 1977-2 apears at 42 Fed. Reg. 4409 (1977).

[2] Judge Flannery's opinion is reported at 470 F. Supp. 674 (D.D.C. 1979).

> tion of any order or regulation under [the ESA] . . . .

Economic Stabilization Act of 1970, Pub. L. No. 91-379, § 209, 84 Stat. 796 (amended 1971) (codified at 12 U.S.C. § 1904 note (1976)).

Judge Flannery also found without merit defendant-appellant's *Accardi* contentions. App. 373, *et seq.*

After careful consideration, and for the reasons set forth in Judge Flannery's opinion, we hold that Congress did not condition the district court's subject matter jurisdiction herein by requiring that DOE first proceed through the administrative enforcement process; and we also hold that DOE violated neither Article III of the United States Constitution nor its own regulations and practices in instituting suit, notwithstanding it had originally filed an administrative proceeding, which it terminated after commencement of suit.[3]

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[3] Defendant-appellant also sought to raise on this appeal whether Judge Flannery acted properly in denying it certain discovery. That is not before us, and we decline to rule on the matter.

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 78-1035

UNITED STATES OF AMERICA,
Plaintiff,

v.

EXXON CORPORATION,
Defendant.

May 17, 1979

MEMORANDUM OPINION AND ORDER

FLANNERY, District Judge.

This case involves alleged overpricing in the sale of crude oil, for which the United States seeks to recover 183 million dollars. It began as an administrative proceeding, and might have continued in that forum had the defendant not filed an action for declaratory relief in the Northern District of Texas to resolve certain "purely legal issues."[1] The Department of Energy ("DOE") responded by filing a suit of its own in this court. Thereupon Exxon filed a motion to dismiss for want of subject matter jurisdiction, alleging that the Department of Energy must exhaust its administrative procedures before coming to the courthouse. This result is said to flow from (1) the creation by Congress of

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[1] Transcript of March 16, 1979 Hearing on Motion to Dismiss, p. 6 [hereinafter referred to as "Hearing Transcript"].

detailed administrative procedures for the issuance of remedial orders, which implicitly repealed or limited a statute that would allow the DOE to come directly to court; and (2) the *Accardi*[2] doctrine, which mandates that an agency must follow its own established regulations and procedures.

This argument was ably briefed by both parties. After consideration of the motion to dismiss and the opposition thereto, and a review of the structure and legislative history of the Department of Energy's statutory authority, the court concludes that Exxon's Motion is supported neither by the pertinent legislative history nor by precedent. The court will accordingly deny the motion to dismiss.

I.

REGULATORY AND PROCEDURAL BACKGROUND

To facilitate an understanding of the issues raised in this motion to dismiss, the court will trace briefly the factual and regulatory context of this case. The Department of Energy is charged with the enforcement of price controls which at the time of the events giving rise to this action governed the production and first sale of domestically produced crude petroleum. *See* Economic Stabilization Act of 1970 ("ESA"), § 203, 12 U.S.C. § 1904 note (1976); Emergency Petroleum Allocation Act of 1973 ("EPAA"), § 4(a), *as amended*, 15 U.S.C. § 753(a) (1976); Department of Energy Organization Act, ("DOEOA" or "DOE Act"), 42 U.S.C.A. §§ 7131-7352 (Supp.1978); Executive Order 11695 (January 12, 1973) (delegation of power granted to President by ESA); Executive Order 11748 (December 6, 1973) (delegation to Federal Energy Office of power granted to

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[2] *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954) (agency failure to comply with its own regulations violates due process).

President by EPAA); Executive Order 11790 (June 27, 1974) (abolition of Federal Energy Office; transfer of authority to Federal Energy Administration ("FEA")); Executive Order 12009 (September 15, 1977) (transfer of delegated authority from FEA to DOE). Pursuant to this mandate, the DOE has established a two-tier pricing framework for domestic sales of crude oil in an attempt to stabilize the price of petroleum products while providing some incentive for increased petroleum production. The essential characteristic of this two-tier system is a distinction between "old oil" and "new oil".

The DOE distinguishes "old oil" from "new oil" by reference to a "base production control level" [hereinafter sometimes referred to as "BPCL"] which is determined by measuring the total number of barrels produced in a given base period. *See* 10 C.F.R. § 212.72 (1978).[3] "New crude oil" is the total number of barrels produced in a given field in a period of time, less the base period control level. *Id.* This new oil, which represents an increase in production over the base period, may be sold at a higher price, known as the "upper tier ceiling price." *Id.* § 212.74. Old oil is restricted to a lower tier ceiling price. *Id.* § 212.73. The purpose of this complicated structure is to prevent profiteering in the sale of crude oil from fields which were in production prior to 1972, while providing an incentive for field openings or production increases since 1972.[4]

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[3] The court recognizes that Section 212.72 contains different definitions of BPCL for the periods before and after January 31, 1976, and that these definitions have an impact on certain issues raised in this case. These matters need not be addressed in great detail in the present posture of the case.

[4] DOE regulations also provide for the release of old oil from the lower ceiling price under certain conditions, 10 C.F.R. § 212.75 (1978), and for limitations on new oil sales in the event of "current cumulative deficiency" in old oil production. 10 C.F.R. § 212.72 (1978). Again, these matters need not be addressed in detail in the present posture of the case.

The defendant, from September 1, 1973 through December 31, 1976, was the operator of an oil field known as the Hawkins Field Unit, in Wood County, Texas. The Hawkins field is presently a "unitized field," as defined by the DOE.[5] The unitization, which became effective on January 1, 1975, was designed to improve the efficiency of the field by initiating a program of inert gas injection. This procedure would have had the effect of shifting reservoir fluids across existing lease lines, a procedure which would have been illegal under state law unless the field were unitized. (Complaint ¶¶ 26-29) Because the unification took place after 1972, it fell within Federal Energy Administration attempts to grapple with the definition of "property" for purposes of determining a "base production control level" for unitized fields. In September, 1975, the FEA ruled that if a field is unitized after 1972, the unit BPCL is to be determined by reference to the total 1972 monthly production from all of the individual leases in the unit. The FEA reasoned that a different result would allow a single operator successfully to evade ceiling tier prices by manipulating production among the wells in a given unitized field. Rule 1975-15, 40 Fed.Reg. 40832 (1975). The original ruling required the implementation of a unit BPCL immediately upon unification. *Id.*

This last requirement subsequently was rescinded, apparently in recognition of the time lag between a unitization and any real changes in production, to permit producers to implement a unit BPCL either on the effective date of the unitization or at the time that production patterns underwent a "significant alteration." *See* 41

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[5] DOE defines a "unitization" as "an aggregation of separate property interests into a single right to produce under a unitization agreement." (Plaintiff's Mem. in Opp. to Def. Motion to Dismiss, p. 6 n.4); *see* 10 C.F.R. § 212.75 (1978). The Hawkins Field has 302 working interest owners and approximately 2,200 royalty interest owners. (Defendant's Mem. in Support of Motion to Dismiss, p. 1).

Fed.Reg. 4931 (February 3, 1976). This rescission, which took place on February 1, 1976, was followed on September 1, 1976, by a detailed definition of "significant alteration in producing patterns." 41 Fed.Reg. 36171 (August 26, 1976); *see* 10 C.F.R. § 212.75 (1978).

In January, 1977, the FEA clarified the effect of the detailed definition of "significant alteration in producing patterns." The clarification indicated that units formed before February 1, 1976, like the Hawkins Field Unit, were not controlled by the new definition, but that the definition would be used as "guidance" in such cases. Ruling 1977-2, 42 Fed.Reg. 4409 (1977). The FEA also stated that it would permit unit operators to attempt to justify a date of "significant alteration in producing patterns" on reasonable bases other than those specified in the definition.

On January 10, 1978, the Department of Energy issued a "Notice of Probable Violation" to Exxon Company, U.S.A., a division of the defendant, alleging that Exxon Company had engaged in certain activities in anticipation of the inert gas injection enhanced recovery program, that this had caused a dramatic change in production patterns, and that Exxon had continued to calculate amounts of "new," "released," and "stripper well" crude oil on a lease-by-lease basis until September, 1976. This, together with continued computation on an allegedly improper basis after September, 1976, allegedly resulted in the sale of "old" oil as "new" oil at the higher ceiling price, resulting in overcharges in $183,305,019.79.

In compliance with DOE procedures,[6] Exxon filed a response to the Notice of Probable Violation ("NOPV")

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[6] The Department of Energy's procedural framework for issuing and adjudicating Notices of Probable Violations (NOPV's) is set forth in Subpart O of 10 C.F.R. Part 205. The recently amended regulations (amendments effective January 6, 1978) contain a detailed series of procedures leading to the issuance of a final administrative order. *See* 43 Fed. Reg. 1930-1937 (1978).

on February 13, 1978. This response took issue with the facts supporting the NOPV, challenged the validity of certain regulations and rulings, and objected to the retroactive application of certain other regulations and rulings. Exxon also responded by filing a suit for declaratory relief in the United States District Court for the Northern District of Texas. *Exxon Corporation v. DOE*, No. 3-78-0420-W (N.D.Tex. filed April 11, 1978). That matter is presently under advisement on various motions, with the presiding judge apparently awaiting the outcome of the present motion to dismiss. Both parties agree that the Texas suit raises substantially the same legal issues as did the administrative proceeding.

The Department of Energy then requested permission from the Attorney General to file this suit, which was filed on June 8, 1978. It contains allegations identical to those in the administrative NOPV proceeding, which was terminated on June 9, 1978.

II.

SUBSEQUENT LEGISLATION DID NOT DEPRIVE THE DEPARTMENT OF ENERGY OF DUAL ENFORCEMENT AUTHORITY

The defendant characterizes this action as a bold and blatant circumvention of DOE's own administrative procedures, and argues that "Congress conditioned jurisdiction upon the requirement that the DOE first proceed through its administrative compliance process, which includes a review by the independent Federal Energy Regulatory Commission ("FERC")." (Memorandum in Support of Motion to Dismiss, p. 4). Exxon recognizes that Section 205 of the Economic Stabilization Act of 1970 originally provided DOE's predecessors with the authority to go to court without first resorting to administrative procedures. Exxon argues, however, that subsequent legislation establishing administrative machinery for DOE and its predecessors "completely changed" the stat-

utory scheme. First, Exxon maintains that amendments to the Economic Stabilization Act in 1971 "signalled the character and nature of the limitations to be placed on the . . . judicial enforcement power." (*Id.* at 7). Second, according to Exxon, the agency's own practice since 1971 confirms the absence of judicial enforcement power. Finally, Exxon maintains that the establishment by Congress of a complex and detailed administrative enforcement scheme in the Department of Energy Organization Act reinforced a Congressional restriction on direct access to the courts.

The Department of Energy urges the court to look to the plain language of Section 209 of the Economic Stabilization Act, *as amended*, 12 U.S.C. § 1904 note (1976), which contains no requirement that DOE exhaust its administrative procedures. The DOE also urges the court to refrain from repealing by implication a facially clear statute, particularly when the intent of Congress, according to the DOE, was not to bar direct suits, but to provide for procedural protections in those cases that were processed administratively.

The court embarks on this interpretive journey by examining the language of the statute. Section 209 of the Economic Stabilization Act of 1970, *as amended*, 12 U.S.C. § 1904 note (1976), applicable to the DOE through Section 5(a)(1) of the Emergency Petroleum Allocation Act, 15 U.S.C. § 754(a)(1) (1976), states:

> *Whenever it appears* to any person authorized by the President to exercise authority under this title *that any individual or organization has engaged*, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, *such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices*, and upon a proper showing a temporary restraining order or a preliminary or

> permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. *In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.* (emphasis added)

The predecessor of Section 209 was Section 205 of the ESA of 1970, 84 Stat. 796. It contained essentially the same language, but without the clarification requiring the agency to request the Attorney General to bring the action, and without the provision in the final sentence clarifying the court's power to order restitution. Exxon recognizes that the original section 205 empowered the agencies exercising authority under the Act to go directly to court, but contends that this power was granted *only* because of the absence of administrative procedures in the ESA of 1970. (Memorandum in Support of Motion to Dismiss, p. 6-7).

In 1971 Congress decided, partly at the urging of the President, to amend the ESA of 1970. Exxon maintains that the expressions of legislative intent which accompanied these amendments made it clear that Congress intended that the agency employ administrative procedures before proceeding to court. This contention, however, is unsupported by the legislative history of the amendments.

II.A. *Economic Stabilization Act Amendments of 1971*

The 1971 amendments to the ESA of 1970 were introduced as an administration bill on October 19, 1971. The Senate Committee on Banking, Housing, and Urban Affairs held hearings on the bill in early November, and reported a clean bill (S. 2891) to the Senate on November 18, 1971. The original bill contained a Section 205, which is identical to the present Section 209. It also contained a section 207, exempting functions exercised under the Act from the provisions of the Administrative Procedure Act, and a section 208, providing for judicial re-

view. *See* Economic Stabilization Legislation: Hearings on S. 2712 before the Senate Committee on Banking, Housing, and Urban Affairs, 92d Cong., 1st Sess. 3-9 (1971).

Contrary to the position taken by Exxon, the Hearings do not indicate in any way that the Congress contemplated limiting the agency's power to proceed to court without first resorting to the administrative process. The comments made by L. Patrick Gray, the ABA representatives, and others focused, as Exxon admits, on the applicability of the Administrative Procedure Act. *Id.* at 19-20. (statement by Charles L. Walker, Under Secretary of the Treasury); 33, 43, 50-51, 56 (statements by L. Patrick Gray regarding section 208 and ability of individual to go to court). The "Gray Memorandum" was submitted to clarify the Administration's position on this point and to set forth the reasons justifying a partial exemption from the APA. *Id.* at 90-94. It is true that the "Gray Memorandum" stated that "[i]t is expected that this review process will proceed first through the administrative review steps provided by the agency regulations." *Id.* at 93. This comment was made, however, in the course of the discussion of sections 207 and 208. Nowhere does the "Gray Memorandum" evince an intent to render nugatory the expanded scope of Section 205. A similar conclusion is compelled by an examination of the comments of the American Bar Association. *Id.* at 160 ("[o]ur interest . . . centers about Section 207 which excludes the functions . . . from the operation of the Administrative Procedure Act"). Therefore, after reviewing the hearings, the court concludes that the Committee was concerned not with preventing agencies from going directly to court, but with providing adequate procedural protections for those matters which were addressed at the agency level while ensuring speed and consistency in decisions.

This conclusion finds support in the later history of the Act. The Senate report discusses Section 207 and

the applicability of the APA, directs the agencies to issue regulations providing a method for obtaining interpretations of or exceptions from rules, and refers to L. Patrick Gray's testimony about "the fullest type of administrative review." S.Rep.No. 507, 92d Cong., 1st Sess. 7-8 (1971), U.S.Code Cong. & Admin. News 1971, pp. 2283, 2290. It goes on to discuss Section 209 (renumbered from section 205 during the preparation of a clean bill), as follows:

> The principal enforcement tool to be used by the Government is likely to be an injunction sought by the Attorney General. Such an injunction may be brought under section 209 of the Economic Stabilization Act, as amended by this bill, upon the request of any person authorized to exercise authority under this Act to the Attorney General that a violation of some regulation or order has occurred, is occurring, or is about to occur. The court granting such an injunction may also grant a mandatory injunction ordering any person to comply with a regulation or order. In addition to injunctive relief, the court may also order restitution of moneys received in violation of any regulation or order. It was not certain that, in these circumstances, there was an inherent equitable power in the court to set things right and order restitution. Restitution has been granted in several cases successfully prosecuted by the Government in Phase I (*United States v. Lieb*, [333 F.Supp. 424], Civil Action No. SA 71 CA 267, D.C., W.D.Tex., Oct. 13, 1971). This provision makes clear that the court has power to grant restitution.

Id. at 9, U.S.Code Cong. & Admin.News 1971, p. 2291.

Congress debated the ESA amendments on November 24, 29, 30 and December 1, 1971. The court has examined this debate in some detail, and has located few references even tangentially relevant to the issues before this court. *See* 117 Cong.Rec. 43078-79, 43236-304,

43456-537, 43672-728. The pertinent references occurred primarily during the course of an attempt to amend Section 207 to allow third parties to challenge administrative rules. *Id.* at 43477-79. These comments do not support Exxon's position.

The Conference Reports on the proposed amendments set forth the final evolution of the Act. *See* H.R.Rep. No. 745, 92d Cong., 1st Sess. (1971); H.R.Rep.No. 753, 92d Cong., 1st Sess. (1971), U.S.Code Cong. & Admin.News 1971, p. 2283. At this stage the Act included a section on administrative procedure, including provisions for limited hearing rights (Section 207); the establishment of civil and criminal sanctions (Section 208); the section allowing the Attorney General to bring suit to obtain injunctive relief or restitution (Section 209); a section providing for private enforcement actions (Section 210); and a provision for exclusive federal jurisdiction to review agency regulations and orders (Section 211). These interrelated provisions make a neat legislative package in which Section 209 would be redundant if Congress limited it in the manner suggested by Exxon. Finally, not a single statement in the Conference Reports suggests the conclusion sought by Exxon.

II.B. *The Emergency Petroleum Allocation Act of 1973*

The enforcement provisions of Section 209 were made applicable to the DOE's predecessor agencies by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754(a)(1) (1976), which provides that:

> . . . sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had

> been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970 . . . .

The court has examined the legislative history of Section 5(a)(1), and concludes that Congress intended simply to carry over in full force all the enforcement authority of the Economic Stabilization Act, *as amended*, to any agency administering the EPAA. *See* S.Rep.No. 159, 93d Cong., 1st Sess. (1973) (discussing largely superseded Senate version of bill); H.R.Rep.No. 531, 93d Cong., 1st Sess. (1973); H.R.Rep.No. 628, 93d Cong., 1st Sess. (1973) (Conference Report), U.S.Code Cong. & Admin.News 1973, p. 2582. The Conference Report merely stated that:

> Section 5(a) of the House amendment provided that the regulation under the House amendment would be enforced under sections 205 through 213 (other than 212(b)) of the Economic Stabilization Act of 1970 (as in effect on the date of enactment of the bill) except that the expiration of the Economic Stabilization Act would not affect any authority to amend and enforce the regulation or to issue and enforce any order under the House amendment.

Id. at 31 U.S.Code Cong. & Admin.News 1973, p. 2707. The court concludes that the authority to choose between dual enforcement mechanisms, vested in agencies by the Economic Stabilization Act, was carried forward without change or impediment through the 1973 EPAA.

II.C. *Department of Energy Organization Act of 1977*

Exxon contends that any remaining doubts about the limitations placed on the Department of Energy's enforcement powers are conclusively dispelled by Congress's enactment in 1977 of Section 503 of the Department of Energy Organization Act, 42 U.S.C. § 7193 (U.S.C.A. Supp.1978). Section 503 sets forth the procedural steps to be followed by DOE in the administrative "remedial

order" process. If the Secretary of Energy believes "that a person has violated any rule, regulation, or order . . . he may issue a remedial order to the person." 42 U.S.C. § 7193(a). The remedial order, if issued, must describe the alleged violation with particularity. *Id.* If a party wishes to contest the proceeding, he is entitled to a review of the order by the Federal Energy Regulatory Commission. This review includes certain procedural rights, including:

> upon request, afford an opportunity for a hearing, including, at a minimum, the submission of briefs, oral or documentary evidence, and oral arguments. To the extent that the Commission in its discretion determines that such is required for a full and true disclosure of the facts, the Commission shall afford the right of cross examination. The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's remedial order, or directing other appropriate relief, and such order shall, for the purpose of judicial review, constitute a final agency action . . . .

42 U.S.C.A. § 7193(c) (Supp.1978).

The defendant maintains that the existence of this statutory scheme precludes direct resort to the courts by the DOE. According to Exxon, the

> absence of a provision in the DOE Act unambiguously authorizing the agency to bypass the administrative process and institute court enforcement actions should alone be sufficient to preclude such arbitrary action. (Mem. in Support of Motion to Dismiss, p. 14).

From its examination of the legislative history of the DOEOA, the court concludes that the many pronouncements about due process at the administrative level and "full review" by the courts took place in the context of

efforts to remedy perceived abuses at the administrative level that had taken place under the EPAA. At no point did Congress explicitly indicate an intention to compel the DOE to resort first to its administrative remedies. In sum, the court has before it a statute, unambiguous on its face, which allows the Department of Energy to sue, and a number of statements which do not derogate from that grant of authority, but rather stress the importance of due process at the administrative level.

Several sections of the DOE Act guide the court in analyzing the effect of the Act on the dual enforcement powers held by DOE's predecessor, the FEA. Section 301 (a), U.S.C.A. § 7151(a) (Supp.1978), states that:

> Except as otherwise provided in this chapter, there are hereby transferred to, and vested in, the Secretary all of the functions vested by law in the Administrator of Federal Energy Administration or the Federal Energy Administration.

Section 503(a), 42 U.S.C.A. § 7193(a) (Supp.1978), states:

> If upon investigation the Secretary or his authorized representative believes that a person has violated any regulation, rule, or order described in section 7191(a) of this title promulgated pursuant to the Emergency Petroleum Allocation Act of 1973, he may issue a remedial order to the person.

Section 708, 42 U.S.C.A. § 7298 (Supp. 1978) reads as follows:

> Except as provided in subchapter IV of this chapter, nothing contained in this chapter shall be construed to limit, curtail, abolish, or terminate any function of, or authority available to, the President which he had immediately before the effective date of this chapter, or to limit, curtail, abolish, or terminate his authority to delegate, redelegate, or terminate any delegation of functions.

The President delegated to the FEA the authority to administer the Emergency Petroleum Allocation Act of 1973 by using the provisions of the Economic Stabilization Act of 1970, as amended. (Executive Orders 11695, 11748, 11790). The net effect of the above provisions was to confer upon the DOE all powers exercised by its predecessors unless they were withdrawn by the DOE Act. Exxon contends that this was done by implication during the enactment of Section 503.

The present version of Section 503 did not appear in the original bill, so that the Senate report contains no discussion relevant to the dual enforcement issue. *See* S.Rep.No. 164, 95th Cong., 1st Sess. 1-46 (1977), U.S. Code Cong. & Admin.News 1977, p. 854. On May 18, 1977, during the initial Senate consideration of the bill, Senator Javits offered an amendment to the Act that would

> establish a statutory procedure for enforcement actions under the Emergency Petroleum Allocation Act. There is no statutory procedure now in existence other than the general guidance contained in the Economic Stabilization Act of 1970 which has been implemented by regulations.
>
> The procedure that has evolved at FEA is one well-suited for emergency needs and temporary authorities, but it falls short of the due process safeguards and separation of functions requirements included in all other permanent regulatory schemes. The amendment is procedural and does not modify any of the underlying provisions of the Emergency Petroleum Allocation Act. It will require that a hearing be held before the Energy Regulatory Board before a party is judged guilty of a violation of the act, thus bringing enforcement of EPAA into line with enforcement of the other regulatory statutes administered by the Department.

123 Cong.Rec. (Daily ed.) S. 7921.

Senator Javits subsequently stated:

> The amendment provides that where a specific remedial order is issued against an individual on grounds of violation of EPAA regulations by the Energy Secretary, upon the application of that particular person or firm, that particular remedial order, as it is called in the bill, shall be subject to review by the Board which is organized for this and other purposes under title IV of the act. The Board shall have the right to call witnesses, cross-examine, and so on; insofar as it is germane to the order, so that the order may be upon the facts contested.
>
> The difference between this and the right of judicial review, which is also contained in the bill as it relates to this issue, is that here, the individual or the corporation charged may have a factual hearing upon the evidence, with the right of cross-examination, et cetera, instead of depending upon the record, which the agency itself may make as the basis for the appeal, which can then be decided only on the substantial-evidence rule.
>
> We believe that, in view of the broad powers which are given to the Secretary and the permanent nature of this regulatory scheme, this particular protection is a very useful one to incorporate in the act.

Id. at S. 7935. Senator Stone, a co-sponsor of the amendment, added this comment:

> This amendment would establish statutory due process procedures by affording an alleged wrongdoer a hearing on the record. Under these procedures, a partly will now have an opportunity at an agency hearing to present its case to an independent board, to rebut evidence presented against it, to confront adverse witnesses and to develop a complete

> record for a fair and equitable judicial review of the final Department order. . . .
>
> Under current FEA procedure, these safeguards have not been fully applied in the compliance and enforcement process. Congress never intended to allow FEA to depart from these requirements of fundamental administrative due process. With the transition from a short-term administrative agency to a permanent, cabinet-level Department of Energy which will be authorized to develop and administer a long-term comprehensive national energy program, the Department must accept the responsibility of insuring administrative due process rights by affording a full and complete hearing on the record in Department adjudicatory hearings. Congress must now pass this amendment to clearly reaffirm its desire for fundamental due process in the administrative arena.

Id. at S. 7937.

Senator Jackson, however, expressed concern that the impact of the amendment had not been fully considered. *Id.* at S. 7936. Senator Javits agreed with Senator Jackson and urged him to look into the matter very carefully. *Id.*[7]

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[7] The defendant cites the following colloquy between Senators Jackson and McClure in support of its position that Congress intended to channel DOE enforcement actions through the agency before proceeding in court:

> Mr. McCLURE. And the Senator hopes that would resolve it there and not have to go to court.
> Mr. JAVITS. Exactly.

123 Cong. Rec. S. 7395. Immediately before this statement, however, the Senators had stated:

> Mr. McCLURE.
>
> . . . . .
>
> Now, just to follow the question of the Senator from Illinois in regard to the effect it may have upon speeding

The House considered its own version of the Act on June 2 and 3, 1977. Congressman Eckhardt offered an amendment to the House version of the bill, identical to the one accepted by the Senate. During the course of deliberating this amendment, the following comments were made:

> Mr. ECKHARDT, Mr. Chairman, when the Congress passed the bill establishing the program that we are dealing with here, it adopted the procedural provisions of the Economic Stabilization Act, which had been adopted in 1970 and which was thought at the time to require rather preemptory procedures respecting agency action. Of course, a great deal of time has passed since then; yet *there is no procedure by which a person ordered to comply with a rule or regulation by a remedial order can get a hearing before the agency.* It cannot get a hearing now before the FEA and under this bill there is no procedure for a hearing before the Department.
>
> What this would do is give a person against whom remedial order is issued a right to a hearing before the agency.
>
> I think it merely affords minimal due process. It affords a little bit less opportunity for a full adjudicatory type hearing than is afforded by the Admin-

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up or slowing down the decisionmaking procedures, I understand the Administrative Procedures Act would require that any applicants have utilized this proceeding before they can go to court.

Mr. JAVITS. Exactly. So it is really my purpose also to get a hearing before an independent decisionmaker where both sides could be presented, not just the bureaucracy side.

Id. It seems that the Senators were merely discussing the familiar rule that parties called before an administrative agency must exhaust their administrative remedies before challenging the agency actions in court.

istrative Procedure Act; but it gives the right to a person to be confronted by the agency's evidence on the other side.

123 Cong. Rec. (Daily ed.) H.5372 (emphasis added).

Mr. BROWN. . . . It seems to me that it is very important to have a sound, prudent, regular administrative procedure. The gentleman's amendment ideally does that. One of the things we have been observing over the last few months is that small independent producers who are challenged by the FEA just simply have to abandon their cases and accept the FEA ruling because they do not have the wherewithal to fight the FEA's decision. This will help assure that they will have the same kinds of rights that bigger outfits with stronger resources have in trying to respond to the bureaucracy.

Id.

Mr. CONTE. . . . With the establishment of this Cabinet-level Department, we must assure the small business sector the rights we denied them when establishing the Federal Energy Administration, that being the basic procedural due process rights in agency adjudicatory proceedings. Without this safeguard, this proposed Department would be the only permanent Cabinet-level entity with the right to adjudicate the rights of regulated persons without adhering to the basic due process provisions. It is essential that there be a normalization of the administrative process, so that independent marketers receive the same even-handed treatment as regulated parties before other Cabinet-level Dpartments. This is a matter of policy and equity we should not ignore. Mr. Chairman, in our hastened efforts to deal with the energy situation and all of its ramifications, it was easy to unintentionally forget the small business, which as a whole, provided a substantial amount of our energy supplies and market-

> needs. This unintentional act has been the past record of our energy-related agencies and is something we cannot allow to continue if we are serious about addressing the energy issue. I urge my colleagues to vote in favor of this amendment.

Id. at 5372-73.

A review of these statements convinces the court that Congress was primarily concerned with improving the administrative process at the agency level. The comments focused on the shortcomings of the agencies administering the EPAA. The court finds nothing in this ambiguous legislative history to indicate that Congress intended to withdraw the dual enforcement powers that it had granted in the Economic Stabilization Act. It is apparent that in enacting Section 503 that Congress focused only on those matters that the DOE decided to process within the agency.[8]

In view of the strong policy consideration against a repeal by implication, *see Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), the court concludes that Congress did not graft an administrative exhaustion requirement onto actions brought under the EPAA when it created the Department of Energy.

III.

THE ACCARDI DOCTRINE DOES NOT BAR THE AGENCY FROM PROCEEDING DIRECTLY TO COURT

The defendant also contends that the doctrine enunciated in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed 681 (1954), requires

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[8] The court sees nothing in the Conference Reports to disturb this conclusion. *See* S. Rep. No. 367, 95th Cong., 1st Sess. 85-86 (1977); H.R. Rep. No. 539, 95th Cong., 1st Sess. 85-86 (1977), U.S. Code Cong. & Admin. News 1977, p. 854.

the dismissal of this action. In *Accardi*, the Supreme Court vacated a deportation order because the record indicated that Accardi had been prejudiced by being placed on the Attorney General's list of "unsavory characters" who should be deported. The Court reasoned that a Deportation Board was required by agency regulations to exercise its own judgment in ruling on a proposed deportation, but possibly had not exercised its own judgment because of the Attorney General's list. *Id.* at 266-67, 74 S.Ct. 499. The *Accardi* case proved to be the seminal case in a long series of decisions requiring agencies to adhere strictly to their own regulations. *E. g., United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); *Vitarelli v. Seaton*, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959). The defendant in the present case seeks to apply the *Accardi* doctrine to obtain the benefit of "all regulations which benefit a party, either by conferring a substantive right, exemption, or procedural safeguard." (Memorandum in Support of Motion to Dismiss, p. 18) Exxon's attack on the filing of this action is premised on a belief that the agency, by proceeding directly to court, deprived Exxon of the right to establish a date of significant alteration in producing patterns on a reasonable basis other than that specified in FEA's September 1, 1976 ruling. Exxon also argues that certain DOE regulations designed to develop a full administrative record in agency proceedings contain no explicit statement that DOE may proceed to court after initiating an administrative proceeding, so that DOE is barred from bringing this suit.

Exxon's reliance upon the *Accardi* doctrine is misplaced for several reasons. First, the numerous cases cited by Exxon deal with situations where the agency violated or attempted to bypass an explicit agency regulation. In *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), for example, counsel for Nixon argued that the Watergate Special Prose-

cutor could not challenge a claim of executive privilege made by the President. The Court rejected this contention on the basis of a regulation promulgated by the Attorney General which gave the Special Prosecutor the explicit power to contest the invocation of executive privilege. *Id.* at 694-96, 94 S.Ct. 3090 (Attorney General could amend regulation, but could not disregard it). In *Service v. Dulles*, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957), the dismissal of a Foreign Service Officer for disloyalty was invalidated because the recommendation for dismissal came from the Civil Service Commission Loyalty Review Board, in contravention of State Department regulations providing that the findings of the Deputy Under Secretary on Loyalty would be final. *Id.* at 388-89, 77 S.Ct. 1152 (Deputy had found Service loyal). In *Vitarelli v. Seaton*, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959), the Secretary of the Interior was deemed bound by his decision to terminate an employee for alleged communist sympathies, even though the employee could have been terminated without cause. *Id.* at 539-40, 79 S.Ct. 968. *See also Igonia v. Califano*, 186 U.S.App.D.C. 161, 165-166, 568 F.2d 1383, 1387-88 (1977) (agency bound by regulation providing that "other evidence of probative value" would be considered in application for social security benefits; *Teleprompter Cable Communications Corp. v. FCC*, 184 U.S.App.D.C. 161, 565 F.2d 736 (1977) (revocation of authority to carry remote signals improper because agency had previously allowed cable station to so operate, without qualification, under grandfather provision in promulgated rule); *Mayor & City Council of Baltimore v. Mathews*, 562 F.2d 914 (4th Cir. 1977) (agency acted *ultra vires* in attempting to terminate federal funds without first attempting to secure voluntary compliance as required by statute and regulation).

Second, Exxon's argument with respect to Ruling 1977-2 seems to presume that the agency will attempt

in the present judicial proceeding to prevent Exxon from establishing an alternate date when a "significant alteration in producing patterns" took place. As indicated in the first section of this Memorandum, the DOE attempted to deal with the need to establish accurate base production control levels ("BPCL's") in fields which had been unitized by providing for a measurement and definition of "significant alteration in producing patterns." In Ruling 1977-2 the agency determined that the definition of significant alteration in producing patterns would be used as a guideline for fields which were unitized prior to September 1, 1976, but that:

> FEA will, however, on a case-by-case basis, permit unit operators to justify the establishment of the date of significant alteration in producing patterns in such units on reasonable bases other than those specified in the present definition.

42 Fed.Reg. 4409, 4415 (January 25, 1977). The "will . . . permit" language, according to Exxon, requires the court to dismiss this action, because Exxon has not been permitted to establish an alternative date before the agency.

The fatal flaw in this argument is in its assumption that Exxon will be barred or precluded from attempting to establish an alternate date in the proceding before the court. Nothing in the record to date in this case indicates that the DOE will attempt to prevent the defendant from introducing evidence in support of such a date.[9] Indeed, it would appear that any attempt by the DOE to do so would be a violation of the *Accardi* doctrine. Nonetheless, Exxon argues that "this judicial action precludes any objective agency consideration of reasonably

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[9] Indeed, counsel for the DOE conceded at the hearing that the Government would not attempt to bar Exxon from establishing a reasonable alternative date in proceedings before this court. (Hearing Transcript, at 45-47).

based alternative definitions of 'significant alteration in producing patterns' because the agency necessarily has assumed in this suit an adversarial and antagonistic posture." (Def.'s Memorandum in Support of Motion to Dismiss, p. 22) This merely means that this court, rather than an arm of the agency, will assume the task of making findings of fact and conclusions of law.[10] As the plaintiff notes, "DOE has simply caused a court proceeding to be instituted in which Exxon has the opportunity to raise all available defenses and has the benefit of every procedural protection available in administrative proceedings." (Memorandum in Opposition to Defendant's Motion to Dismiss, p. 26).

Exxon also maintains that the DOE, by electing to initiate administrative proceedings with the issuance of an NOPV, forfeited its right to proceed to court. First, according to Exxon, neither Section 205.191 [11] nor 205.192 [12] of 10 C.F.R. authorize a referral to the Depart-

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[10] At the hearing in this matter it became apparent that Exxon's primary fears are this court's lack of expertise in energy matters and the absence of a concrete standard for this court to apply if this case goes to trial. (Hearing Transcript, at 8-11) In recent years, Congress has seen fit to bestow upon the federal courts jurisdiction over numerous, complex areas of the law. The court recoils from ruling that this complexity bars the court from hearing a particular case. Exxon's position on the absence of a standard is also without merit. Ruling 1977-2 stated that alternative dates for "significant alterations in producing patterns" would be allowed if a company demonstrated *"reasonable bases"* for the alternative date. The court must therefore determine, after weighing the evidence, if Exxon has demonstrated a reasonable basis for an alternative date. This standard is necessarily flexible, but it is a standard.

[11] 10 C.F.R. § 205.191, as amended in January, 1978, sets forth the procedures to be followed in issuing a notice of probable violation and in responding to one. 43 Fed. Reg. 1931-32 (January 13, 1978)

[12] 10 C.F.R. § 205.192, as amended, sets forth the procedures for the second stage of the administrative proceedings, the

ment of Justice at the NOPV stage. The absence of such authorization means that the agency is bound by its decision to proceed administratively. Exxon buttresses this contention by reference to 10 C.F.R. § 205.190(a), which provides that

> Nothing in these regulations is intended to affect the authority of ERA enforcement officials in coordination with the Department of Justice to initiate appropriate civil or criminal enforcement actions in court *without first initiating* administrative proceeding pursuant to this subpart.

43 Fed.Reg. 1931 (January 13, 1978). Exxon also contends that the preamble to the most recent revision of the enforcement regulations sets up an alternative which DOE must choose. *See* 43 Fed.Reg. 1930-31 (January 13, 1978) (agency not barred "from initiating an appropriate civil or criminal enforcement action in court *rather than* utilizing the administrative procedures established in these regulations").

This semantical excursion ignores several unshakable facts. The agency promulgated in 1974 a regulation empowering it to bring an action "[w]henever it appears . . . that any person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any regulation or order issued under this chapter . . ." 10 C.F.R. § 205.204 (1978) This regulation parallels DOE's statutory authorization to sue, and it contains no reference to an election of remedies. Moreover, although Exxon has protested vigorously that "[t]his action eradicates both the additional rights conferred by the in-

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"proposed remedial order." The agency "may" issue a proposed remedial order after issuing a NOPV, or even if it has not previously issued an NOPV. Subsection (d) provides that "[a] proposed remedial order may be referred at any time to the Department of Justice for appropriate action. . . ." 43 Fed. Reg. 1932 (January 13, 1978)

terim procedures and the rights existing under prior compliance measures," it does not point to a *single* procedural protection which it would have received in the administrative proceeding that it will not receive in this court.

After examining the numerous regulations cited by Exxon in support of its position, the court concludes that Exxon's contentions are without merit. None of the regulations states explicitly that the DOE must elect its remedy, and the court will not read such a requirement into the regulations on the basis of the arguments proffered by Exxon, which essentially present a fragmented analysis of the regulations, rather than an examination of the regulatory scheme as a whole.

Exxon's contention that the DOE is bound by its prior administrative practice is also without merit. Exxon has not indicated that it was prejudiced in any way by relying on the practice of DOE and its predecessors of conducting most compliance actions administratively. Moreover, the recent shift in enforcement strategy resulted from a barrage of criticism of the enforcement efforts of DOE's predecessors, and not from the whim or caprice of the agency. It is significant that one major source of criticism, the Final Report of the Task Force on Compliance and Enforcement (March, 1978 reprint) [hereinafter the "*Sporkin Report*"] attributed the reluctance to proceed directly to court not to a lack of power to do so, but to the need to refer cases to the Department of Justice for prosecution:

> The Agency has broad powers to remedy violative conduct in both the civil and administrative fora. Up until this time, however, the Agency has virtually abandoned its power to bring a civil injunctive action or seek restitution in the federal courts. Not doing so has impaired the effectiveness of the Agency's enforcement program. In large part, the FEA's reluctance to bring civil actions is due to the Agen-

> cy's lack of authority to represent itself in Court. In addition, despite the enormity of the Agency's enforcement program, the Department of Justice only devotes approximately four man-years to the handling of FEA's civil action.
>
> An extremely important element in the effectiveness of other agencies with enforcement powers similar to those of the FEA has been their ability to represent themselves in federal courts—particularly in the context of seeking remedial judicial orders. Regulatory agencies created to develop a special expertise in complex or technical areas cannot be constantly required to rationalize or justify Agency policy to the Justice Department or to obtain its concurrence in pursuing actions with significant regulatory consequences. Not only can the practice be terribly demoralizing to the Agency, but it can also impede the implementation of critical Agency policy decisions.

Sporkin Report pp. xxvii-xxviii. *See also* III-25 (recommendation that special unit be established to investigate and prosecute complex cases); V-34-42 (overview of authority for enforcement actions); V-94-101 (authority to seek injunctive relief, restitution, and civil penalties); V-124-136 (review of numerous problems resulting from Justice Department representation).

IV. CONCLUSION

The Department of Energy enforces a statute, the EPAA, which explicitly refers to Section 209 of the Economic Stabilization Act, as amended. Section 209 states baldly, without qualification, that the agency may request the Attorney General to bring suit *whenever* it appears that a violation has occurred or is about to occur. This statutory muscle has not atrophied from lack of use. Nor can it be said, as long as Section 209 remains on the books, that the mere creation of detailed administrative

procedures at the agency level eliminates the power to go to court. Finally, the federal courts provide the very separation of judicial and prosecutorial functions and the same procedural protections that Exxon laments losing. The court will, therefore, deny Exxon's motion to dismiss.

APPENDIX J

STATUTES AND REGULATIONS INVOLVED

Section 209 of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note (1976), provides:

"§ 209. Injunctions and other relief

"Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 (1982), provides:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pub. L. 89-554, Sept. 6, 1980, 80 Stat. 393.

10 C.F.R. § 212.72 (1975) in pertinent part provided:

"Property" is the right which arises from a lease or from a fee interest to produce domestic crude petroleum.

10 C.F.R. § 212.75, as promulgated on February 1, 1976, 41 Fed. Reg. 4931, 4941 (1976), provided:

§ 212.75. Enhanced recovery projects on units.

(a) *Rule.* A producer shall, as of the date of implementation of enhanced recovery operations on

a unit or as of the date production patterns with respect to individual leases within a unit are substantially altered (whichever date occurs first), establish a unit base production control level for the unit.

"Old crude oil" means the total number of barrels of crude oil produced and sold from all properties that constitute the unit in a specific month, less the total number of barrels of new crude oil produced and sold from the unit in that month, and less the total number of barrels of crude oil sold at the upper tier ceiling price pursuant to the provisions of paragraph (e) of this section.

"Unit base production control level" means the total number of barrels of old crude oil (1) produced and sold from all properties that constitute the unit, plus (2) the total number of barrels of crude oil produced from all stripper well leases that constitute the unit during the 12 month period immediately preceding the establishment of a unit base production control level for the unit, such total divided by 365, multiplied by the number of days in that particular month.

"Unit" means the right to produce crude oil that arises from a unitization agreement approved by the applicable state or municipal regulatory authority.

(b) *Definitions.* For purposes of this section—

"Current unit cumulative deficiency" means the total number of barrels by which production and sale of crude oil from a unit was less than the unit base production control level subsequent to the first month (following the establishment of a unit base production control level for that unit) in which new crude oil was produced and sold from that unit, minus the total number of barrels of domestic crude oil produced and sold in each prior month from that unit (following the establishment of a unit base produc-

tion control level for that unit) which was in excess of the unit base production control level for that month, but which was not classified as new crude oil because of this requirement to reduce the amount of new crude oil in each month by the amount of the current unit cumulative deficiency.

"Enhanced recovery" means any method, previously approved by applicable state or municipal regulatory authority (or by FEA), of recovering crude oil in which part of the energy employed to move the crude oil through the reservoir is applied from extraneous sources by the injection of liquids or gases into the reservoir.

"New crude oil" means the total number of barrels of crude oil produced and sold from all properties that constitute the unit in a specific month, less (1) the unit base production control level, and less (2) the current unit cumulative deficiency.

(c) Except as provided in paragraphs (d) and (e) of this section with respect to new crude oil and stripper well lease crude oil, no producer of crude oil from a unit may charge a price higher than the lower tier ceiling price (as set forth in § 212.73) for any first sale of domestic crude oil.

(d) Notwithstanding the provisions of paragraph (c) above, a producer of crude oil from a unit may, in any month, charge a price not to exceed the upper tier ceiling price (as set forth in § 212.74) in first sales of new crude oil.

(e) Notwithstanding the provisions of paragraphs (c) and (d) above, a producer of crude oil from a unit may, in any month, sell at a price not to exceed the upper tier ceiling price (as set forth in § 212.74) a number of barrels equal to the total number of barrels of crude oil produced from all stripper well leases that constitute the unit during the 12 month

period immediately preceding the establishment of a unit base production control level for the unit, divided by 12.

10 C.F.R. § 212.75, as amended effective September 1, 1976, 41 Fed. Reg. 36172, 36184 (1976), provided:

§ 212.75. Determination of upper tier crude oil produced from unitized properties.

(a) Rule. With respect to each unitized property, a producer shall, as of the effective date of unitization, establish a unit base production control level.

(b) Definitions. For purposes of this section:

"Current unit cumulative deficiency" means the total number of barrels by which production and sale of crude oil from the unitized property was less than the unit base production control level subsequent to the first month (following the establishment of a unit base production control level for that unitized property) in which any crude oil produced and sold from that unit was eligible to be classified as actual new crude oil (without regard to whether the amount of actual new crude oil was exceeded by the amount of imputed new crude oil), minus the total number of barrels of domestic crude oil produced and sold in each prior month from that unitized property (following the establishment of a unit base production control level for that unitized property) which was in excess of the unit base production control level for that month, but which was not eligible to be classified as actual new crude oil because of this requirement to reduce the amount of actual new crude oil in each month by the amount of the current unit cumulative deficiency.

"New crude oil" means either (a) actual new crude oil, which is the total number of barrels of crude oil produced and sold in a specific month from

all properties that constitute the unitized property, less (1) the unit base production control level, and less (2) the current unit cumulative deficiency; or (b) imputed new crude oil, which is a number of barrels of new crude oil produced and sold during the 12 month period immediately preceding the establishment of a unit base production control level for the unitized property, divided by 12; whichever number is greater.

"Old crude oil" means the total number of barrels of crude oil produced and sold in a specific month from all properties that constitute the unitized property, less the total number of barrels of new crude oil produced and sold from the unitized property in that month, as less the total number of barrels of crude oil sold at the upper tier ceiling price pursuant to the provisions of paragraph (f) of this section.

"Significant alteration in producing patterns" means the occurrence of either (1) the application of extraneous energy sources by the injection of liquids or gases into the reservoir, or (2) the increase of production allowables for any property that constitutes the unitized property.

"Unit base production control level" means, (1) the total number of barrels of old crude oil, as defined in § 212.72, produced and sold during the 12 month period immediately preceding the establishment of a unit base production control level for the unitized property from all properties that constitute the unitized property; plus (2) the total number of barrels of crude oil produced during the 12 month period immediately preceding the establishment of a unit base production control level for the unitized property from all stripper well properties that constitute the unitized property; divided by 365, and

multiplied by the number of days in the particular month.

"Unitized property" means the right to produce crude oil that arises from a unitization agreement approved by the applicable governmental regulatory authority (or FEA).

(c) Notwithstanding the provisions of paragraph (1) above, a producer shall not be required to establish a unit base production control level for a particular unitized property, provided that the producer has (pursuant to the provisions of 10 C.F.R. Part 205, Subpart G) certified to FEA its intention to continue to determine volumes of upper and lower tier crude oil separately for all properties that constitute the unitized property, and provided further that the unitized property has not sustained a significant alteration in producing patterns.

(d) Except as provided in paragraphs (e) and (f) below with respect to new crude oil and imputed stripper well property crude oil, no producer of crude oil from a unitized property may charge a price higher than the lower tier ceiling price (as set forth in § 212.73 of this Part) for any first sale of domestic crude oil produced and sold from the unitized property.

(e) Notwithstanding the provisions of paragraph (d) above, a producer of crude oil from a unitized property may, in any month, charge a price not to exceed the upper tier ceiling price (as set forth in § 212.74) in first sales of new crude oil produced and sold from the unitized property.

(f) Notwithstanding the provisions of paragraphs (d) and (e) above, a producer of crude oil from a unitized property may, in any month, charge a price not to exceed the upper tier ceiling price (as set

forth in § 212.74) in first sales of imputed stripper well crude oil, which is a number of barrels of crude oil equal to the total number of barrels of crude oil produced during the 12 month period immediately preceding the establishment of a unit base production control level for the unitized property, from all stripper well properties that constitute the unitized property, divided by 12.

APPENDIX K

EXXON CORPORATION'S AFFILIATES AND PARTIALLY OWNED SUBSIDIARIES

Abu Dhabi Company for Onshore Oil Operations
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Aditivos Orinoco, C. A.
Administravia Industrias Reliance S.A. de C.V.
Adria-Wien Pipeline Gesellschaft mit beschrankter Haftung
AFCO AB
Aishin Sekiyu K. K.
Aktiebolaget Svensk Petroleumadministration
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Andian National Corporation, Limited
Arabian American Oil Company
Aramco Overseas Company
Aramco Services Company
A/S Futurum
A/S Hydrantanlaegget Kobenhavns Lufthavn, Kastrup
Asakawa Sekiyu K.K.
Asociacion Civil "Academy La Castellana"
Atlas Supply Company
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited
Aviation Services Saudi Arabia Limited
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.
B.V. Autoservicebedrijf "de Beuk" Leimuiden
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K. K.
Bayerische Erdgasleitung G.m.b.H.
BEB Gewerkschaften Brigitta und Elwerath Betriebsfuhrungsgesellschaft m.b.H.

Bel-Air Entreposage S. A.
Building Products of Canada Limited
Byron Creek Collieries (1983) Limited
Canada Wide Mines Ltd.
Carnduff Gas Limited
Castle Peak Power Company Limited
Champlain Oil Products Limited
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Sekiyu Hanbai K.K.
Cia Refinadora Petrolera Santo Domingo, Inc.
Colmant Cuvelier Dodge S.A.
Commercial Polymers Pty. Ltd.
Compagnie d'Etancheite Africaine en Cote d'Ivoire S. A.
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliaire du Petrole
DFTG Deutsche Flussigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daiichi Kouyu K. K.
Daitsu Sangyo K.K.
Delta Rope & Twine Limited
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petroleir de la Corse
Det Gronlandske Olieaktieselskab
Deudan-Holding GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Dixie Pipeline Company
Dodge de Mexico S.A. de C.V.
Drivmedelscentralen Aktiebolag
Dukhan Service Company
E S F Limited
Eagle Kenso K.K.
East Japan Oil Development Company, Limited
East Texas Salt Water Disposal Company
Eiko Sekiyu K.K.
Ejendomsaktieselskabet af 12. juni 1964

Elwerath Erdol und Erdgas AG
Emirates Oilfield Chemicals Company
Emori Sekiyu K.K.
Emsland-Erdolleitung G.m.b.H.
Entrepot Petrolier de l'Aveyron (E.P.A.)
Erdgas-Verkaufs-Gesellschaft m.b.H.
Escuela Las Morochas, C. A.
Esso Chemical Alberta Limited
Esso Chimie
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Italiana S.p.A.
Esso Malaysia Berhad
Esso of Canada Limited
Esso Resources Canada Limited
Esso Societe Anonyme Francaise
Esse Standard Tunisie S. A.
Exact Reisebyra A/S
Exxon Chemical Pakistan Limited
F. T. Giken Kabushiki Kaisha
Federal Pacific Electric de Mexico S.A. de C.V.
Federal Pioneer Limited
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Forenade Svenska Oljeimportorers AB
Forjas de Colombia, S. A.
415572 Ontario Inc. (operating as Kentom Steel)
Fuji Kogyo K.K.
Fukui Sekiyu K.K.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha

Geobutane—Lavera
Gewerkschaft Brigitta
Gewerkschaft Elwerath
Gewerkschaft Elwerath & Co. GmbH.
Gewerkschaft Erdol-Raffinerie Deurag-Nerag
Gilbarco do Brasil S. A.—Equipamentos
Goroku Sekiyu K.K.
Grande Ecaille Land Company, Inc.
Groupement Immobilier Petrolier
Groupement Petrolier Aviation
Groupement Petrolier du Finistere G.I.E.
Groupement pour l'Etude d'un Pipeline Bordeaux Toulouse
Hankyu Ferry K.K.
Hannoversche Erdolleitung G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Hayakawa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokuyu Sekiyu K. K.
Houston Regional Monitoring Corporation
Hydranten-Betriebsgesellschaft
Hydrierwerke Poelitz Aktiengesellschaft
Immeuble Entretien Service I.E.S.
Imperial Oil Limited
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha
Industrias Reliance S.A. de C.V.
Industry Promotion Enterprises Limited
Intecom, Inc.
Interface Mechanisms Inc.
Internationale Gas Transport Maatschappij B. V.
Interprovincial Pipe Line (Alberta) Ltd.
Interprovincial Pipe Line Limited
Interprovincial Pipe Line (NW) Ltd.
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited

Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Aizu General
K.K. Daimaru
K.K. General Sekiyu Hanbaisho
K.K. Genetech
K.K. Heian Sekiyu
K.K. Kanagawa Sekiyu Shokai
K.K. Kyoei Shosha
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumasa Shoten
K.K. Nippatsu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toko
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S ejendomsselskabet af 8.oktober 1965
K/S Hoje Taastrup Storcenter II
K/S Statfjord Transport A/S & Co.
Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited
Kanto Kygnus Sekiyu Hambai K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihin Kygnus Kabushiki Kaisha
Keiyo Sekiyu Hanbai K.K.
Kenarin Agencies Ltd.
Kenya Petroleum Refineries Limited
Kepco Mfg. Inc.
Kibo Sekiyu Hanbai K.K.
Kinwa Sekiyu K.K.
Kobe Port Service Kabushiki Kaisha
Kobe Standard Sekiyu K. K.
Kowa Sekiyu K.K.

Kowloon Electricity Supply Company Limited
Kygnus Ekka Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Marketing Service K.K.
Kygnus Sekiyu K. K.
Kyushu Eagle K.K.
LPL Investments, Inc.
Lakehead Pipe Line Company, Inc.
Laykold Corporation
LEAG Aktiengesellschaft fur luzernisches Erdol
Les Docks des Petroles d'Ambes
Les Restaurants Le Voyageur Inc.
Long Beach Oil Development Company
Magota Sekiyu K.K.
Mainline Pipelines Limited
Makoto Sekiyu Kabushiki Kaisha
Maple Leaf Petroleum Limited
Maquinas de Coser y Bordar Sigma, S. A.
Mars-Alcatel, S.A.
Marugo Gas K.K.
MEGAL FINCO
MEGAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corporation of Houston
Mikawa Bussan K.K.
Mittelrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee
NPC Services, Inc.
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Native Venture Capital Co. Ltd.
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Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited
Nissei Sekiyu Kabushiki Kaisha
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Norddeutsche Oelleitungs-gesellschaft m.b.H.
Nordrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Nord-West Oelleitung G.m.b.H.
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Norsteel Limited
Northern Steel Co. Ltd.
Northward Developments Ltd.
Northwest Company, Limited
Nottingham Gas Limited
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Offshore Medical Support Limited
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Spill Response Limited
Oil Transport Company (Saudi Arabia) Limited
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Omnisport B.V.
Omnisport International Inc.
Omnisport International (U.K.) Limited
Omnisport International (U.S.) Inc.
Omniturf Surfaces (N.A.) N.V.
107580 Canada Inc.
139675 Canada Limited
140129 Canada Limited
140233 Canada Limited
Osaka Propane Gas Hambai Kabushiki Kaisha
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P. T. Stanvac Indonesia

Pars Investment Corporation
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Petrosvibri S.A.
Photonic Automation Inc.
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Pipeline Service
Pipeline Service Iran
Pipeline Service U.K.
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Plantation Pipe Line Company
Polder-Seehafen-Harburg GmbH
Portland Pipe Line Corporation
Potencia Industrial S.A.
Productos Lorain de Mexico S.A. de C.V.
Progas A/S
Raffinerie du Midi S.A.R.L.
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Sakurajima Futo K.K.
Sanko Oil Kabushiki Kaisha
Sanwa Kasei Kogyo Kabushiki Kaisha

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Saudi Arabian Lube Additives Company Limited
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SEAG Aktiengesellschaft fur schweizerisches Erdol
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Societe Reunionnaise d'Entreposage
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Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Company, Limited
Tokai General Sekiyu Hanbai K.K.
Toko Sekiyu K.K.
Toledo Scale Company de Mexico S.A. de C.V.
Toledo Werk GmbH
Tonen Energy International Corp.
Tonen Maintenance K.K.
Tonen Sekiyukagaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology K. K.
Towa Sekiyu K.K.
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Van Salt Water Disposal Company
W.A.G. Pipeline Pty. Ltd.
W. H. Adam, Ltee, Ltd.
Wako Jushi Kabushiki Kaisha
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Westgas G.m.b.H.
Williamsport Properties Limited
Winnipeg Pipe Line Company Limited
Wohnungsbaugesellschaft, Steimbke-Rodewald G.m.b.H.
Worex
Worex et Cie
Wrenford Insurance Company Ltd.
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshimi Gas Kabushiki Kaisha
Yuai Sekiyu K.K.
Yugen Kaisha Nishi Kobe Bosai Center

MOTION FILED
OCT 11 1985

No. 85-429

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EXXON CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

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---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States ("Chamber") moves for leave to file the attached brief *amicus curiae* in this case pursuant to Supreme Court Rule 36.1. This brief is filed in support of Petitioner Exxon Corporation ("Exxon"), with the written consent of Exxon and several of the numerous Respondents in this case, including the United States.[1] This motion

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[1] Consent letters from Exxon, the Solicitor General, the State of Minnesota, Champlin Petroleum Company, Tosco Company, Tenneco Oil Company, Pennzoil Company, Marathon Petroleum Company, U.S. Oil & Refining Company, Mobil Oil Corporation, Murphy Oil Corporation and Ashland Oil, Inc. are being filed with the Clerk of the Court.

is necessary because Respondent States Arkansas, Delaware, Iowa, Kansas, North Dakota, Rhode Island, Utah, West Virginia and Louisiana have refused to consent to the filing of this brief, and efforts to obtain the consent of the remaining Respondents were unsuccessful.

The Chamber is the largest federation of business organizations and individuals in the United States, with a current membership exceeding 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and local and state chambers of commerce. The Chamber regularly advocates its members' views in litigation of issues of national concern to the American business community, and in fact filed a brief *amicus curiae* in support of the Petitioner in the proceeding below. This case involves questions about the imposition of retroactive liability and the appropriate standards for judicial review of agency action. These issues present to this Court critical questions of constitutional and administrative law that have far-reaching consequences for the business community at large.

The Chamber opposes the concept of retroactive law enforcement, and has participated in several other cases advocating the reversal of government actions with retroactive effect.[2] In these cases, the Chamber has consistently stressed the importance of unambiguous regulations which conform with the legislative intent of the enabling statute. In order to comply with regulatory programs, businesses need to know on a timely basis

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[2] *See, e.g., Airwork Service Division* v. *Director, Division of Taxation*, 97 N.J. 290, 478 A.2d 729 (1985), *cert. denied*, 53 U.S.L.W. 3838 (U.S. May 28, 1985) (No. 84-1506) (challenge to the retroactive assessment of state sales taxes); *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 104 S. Ct. 2709 (1984) (challenge to the retroactive application of the Multiemployer Pension Plan Amendments Act of 1980).

what conduct is permitted and proscribed by the regulations applicable to their operations. This is particularly important when vague, equivocal and highly technical regulations give rise to severe retroactive liability, as in the case below, which resulted in the largest monetary judgment in the history of American jurisprudence.

In keeping with traditional notions of fundamental fairness, government agencies have an obligation to notify businesses of what the law is *before* that law is enforced against them. In the instant case, the Department of Energy ("DOE"), successor to the Federal Energy Administration ("FEA"), failed to meet this obligation when it applied portions of newly reinterpreted price control regulations retroactively for 20 months prior to their effective date. Accordingly, the agency held Exxon liable for conduct which was permissible under its own earlier interpretations. Such retroactive application of reinterpreted agency regulations offends constitutional principles of due process, and must be reversed. For this reason alone, the Court should grant Exxon's petition for certiorari.

The Chamber is also concerned about the amount of judicial deference accorded to agency action by the Temporary Emergency Court of Appeals ("TECA"). This Court has reviewed only two TECA decisions [3] and has never reviewed a TECA decision involving the private rights or obligations of the petroleum industry under allocation and price control regulations. Infrequent Supreme Court review of TECA decisions may result in what has been described as an "institutional bias in favor of agency policy," a trend that has been of growing concern to the petroleum industry and to businesses in general. Impartial judicial review of agency action is a fundamental principle of administrative law, essential

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[3] *See Fry* v. *United States*, 421 U.S. 542 (1975) (application of federal wage control to state employees); *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245 (1982) (validity of state tax on gasoline).

to ensuring that procedural safeguards are observed. Intervention by this Court will ensure that TECA functions under the same standards of judicial deference governing other courts.

As the principal voice of the American business community, the Chamber is well suited to present the broad interest of business in this case. The Chamber believes it is important for this Court to recognize the significance of these issues to the business community and, therefore, respectfully requests leave to file the attached brief.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion for Leave to File Brief *Amicus Curiae* for a statement of its interests in this proceeding.

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[1] The Chamber believes that the facts of this case have been sufficiently set forth in the Petition for Writ of Certiorari. Rather than burdening the Court with a full restatement, the Chamber adopts Exxon's Statement.

ARGUMENT

I. RETROACTIVE APPLICATION OF NEW AGENCY INTERPRETATIONS OF AMBIGUOUS REGULATIONS VIOLATES DUE PROCESS.

While it is unquestionably the duty of American businesses to comply with the law, it is the duty of the government to make clear what the law is, in advance, so that companies can comply with it. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Unambiguous regulations are especially important when they concern expensive business decisions, as in the case below, which involved methods for accounting oil production at the Hawkins Oil Field. As detailed in Petitioner's Statement, the Federal Energy Administration ("FEA") created a crazy quilt of administrative regulations which utterly failed to make its price control requirements clear, and now the Department of Energy ("DOE"), FEA's successor, seeks to make Exxon bear the burden of that failure by holding the company liable for the largest monetary judgment in American history. The fundamental unfairness of this result is striking, and the intervention of this Court is needed to protect the company's constitutional right to due process of law.

From the beginning, Exxon's due process rights were violated by the sheer ambiguity of the petroleum price control regulations at issue. Vague and ambiguous laws violate fundamental rights. *Grayned* v. *City of Rockford*, 408 U.S. at 108. Laws must give a person of ordinary intelligence a reasonable opportunity to know what the law is so he may direct his actions and conduct accordingly. *Id.* "Vague laws," reasoned this Court, "may trap the innocent by not providing fair warning." *Id.* In addition, clear standards deter arbitrary and discriminatory enforcement of rules and regulations. *Id.*

The Temporary Emergency Court of Appeals ("TECA") itself has stressed the importance of clear agency interpretation of regulations:

> Fundamental fairness requires that the regulations be clear so that men of common intelligence need not guess at the meaning and differ as to the application. One can have knowledge of a legal duty imposed by regulations only when there is adequate notice.

Tenneco Oil Co. v. *FEA*, 613 F.2d 298, 303 (Temp. Em. Ct. App. 1979). It concluded that "[a] court cannot put its imprimatur on a regulation that was intended but never enacted." *Id.*[2]

The regulations in question here, promulgated pursuant to the Emergency Petroleum Allocation Act of 1975, *as amended*, 15 U.S.C. §§ 751-56 (1983), are highly technical and equivocal.[3] Their ambiguities were worsened by the agency's indecision and vacillation about the subject matter to which its own regulations applied.[4] Any industry requests for administrative interpretations were not answered in a timely manner.[5] A Senate Subcommittee examining the issue of regulatory clarity in this context concluded:

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[2] *See also, Kent Nowlin Construction Co.* v. *OSHRC*, 593 F.2d 368, 371 (10th Cir. 1979) (persons "should not be penalized for deviation from a standard the interpretation of which, in relationship with kindred standards, cannot be agreed upon by those who are responsible for compelling compliance with it and with oversight of the procedure for its enforcement").

[3] *See supra* note 17 and accompanying text.

[4] *See supra* note 17 and accompanying text.

[5] One commentator has noted that the greatest source of petroleum regulatory problems has been the absence of authoritative, timely guidance as to the precise meaning of the price and allocation regulations. Mode, *Federal Petroleum Regulation in the Courts*, 29th Annual Institute on Oil and Gas Law 39, 93 (1978) ("It is generally conceded by those who have studied the regulatory history that the failure to provide adequate and timely interpretations of these rules has created major difficulties for the industry and for the agency's own compliance program.").

> FEA's failure to have adequate guidelines [and] regulations . . . has resulted in many respects in a lack of *fairness* to firms in the regulated industry and to consumers . . . Moreover, firms are often subject to varying interpretations resulting in different applications of regulations . . .[6]

If agency officials cannot determine what their own rules mean, private citizens and businesses cannot be expected to do so.

Clear interpretation of the regulations governing businesses is necessary to give companies proper notice of required conduct.[7] This need is particularly acute with respect to interpretations of price control regulations which govern businesses that invest substantial amounts of time and money in research and development. In order to expend corporate resources appropriately, businesses must be able to readily and confidently ascertain regulatory intent.

Apart from the ambiguity and vagueness of the regulations, Exxon's due process rights were further violated when DOE retroactively applied FEA's reinterpretation of them. Due process prohibits retroactive application when the interests of those affected outweigh the need for retroactivity. *SEC* v. *Chenery Corporation*, 332 U.S. 194, 203 (1947). This Court has held that the need for retroactivity is outweighed when it would (1) "unduly intrude upon reasonable reliance interests,"[8] (2) impose a liability which affected persons could not reason-

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[6] Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., *The Federal Energy Administration: Enforcement of Petroleum Price Regulations*, 38 (Comm. Print 1975) (emphasis in original).

[7] *FTC* v. *Atlantic Richfield Company*, 567 F.2d 96, 103 (D.C. Cir. 1977).

[8] *Heckler* v. *Community Health Services*, 104 S. Ct. 2218, 2224 n. 12 (1984).

ably have anticipated,[9] or (3) interfere with antecedent rights, unless the import of the regulatory terms and the manifest intention of the legislature unequivocally indicate otherwise.[10]

In the instant case, the intent of the legislature in enacting the Emergency Petroleum Allocation Act of 1975 is implicit—to promote production of domestic oil in order to reduce America's dependence on foreign oil.[11] But rather than promote domestic oil production, DOE's retroactive application of the price control regulations penalized Exxon for its enhancement efforts at the Hawkins Oil Field. Exxon could not have anticipated retroactive imposition of liability. And in contravention of its earlier interpretation of the regulations, DOE's action abrogated Exxon's rights to use beneficial accounting methods, and denied Exxon an opportunity to establish that its accounting methods were proper. In so doing DOE disregarded this Court's holding that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen." *Service* v. *Dulles*, 354 U.S. 363, 372 (1957). To hold Exxon liable under these circumstances grievously violates its due process rights.

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[9] *See e.g., Central Illinois Public Service Company* v. *U.S.*, 425 U.S. 21, 32 (1978) ("[n]o employer in viewing the regulation could reasonably suspect that a withholding obligation existed," and it was "hardly reasonable to require the employer to fill the gap on its own account"); *Lewellyn* v. *Frick*, 268 U.S. 238, 252 (1925) (a regulation cannot be applied retroactively "to impose an unexpected liability that if known might have induced those concerned to avoid it and use their money in other ways").

[10] *Green* v. *United States*, 376 U.S. 149, 160 (1964).

[11] Congress enacted the Emergency Petroleum Allocation Act of 1975 to deal with shortages of petroleum products caused by inadequate domestic production and the unavailability of imports sufficient to satisfy domestic demand. 15 U.S.C. § 751 (1983).

The Chamber strongly advocates business compliance with administrative regulations. A government agency, however, has a concomitant duty to clearly set forth the obligations of private parties. Where an agency has not done so, a court cannot uphold a retroactive reinterpretation of such regulations when it imposes severe penalties on persons who reasonably relied on earlier interpretations. Such retroactive lawmaking not only disrupts and discourages essential business decision-making, but also impedes the accomplishment of the national goals that the statutes and regulations were designed to further. The cure for unclear and ambiguous regulations is prospective clarification or new regulations, not penalties based upon newly announced retroactive standards. "If the regulation missed its mark, the fault lies in the working of the regulation—a matter easily remedied . . . with no need to press limits by judicial construction." [12]

II. THIS COURT'S INTERVENTION WILL INSURE IMPARTIAL JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS BY TECA.

The amount of deference TECA accorded DOE's action presents this Court with an independent reason for exercising its discretionary power of review. TECA's exclusive jurisdiction of petroleum price control regulations and this Court's infrequent review of TECA decisions have unduly insulated petroleum price control cases from the well-settled standards of judicial deference governing other federal courts. Review of this TECA decision by the Court would ensure fair and objective decision making, and quell the growing concern about TECA's tendency towards institutional bias.

Impartial review of agency actions is essential to the administration of justice. In *Volkswagenwerk* v. *Federal Maritime Commission*, 390 U.S. 261, 272 (1968), *modi-*

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[12] *Diamond Roofing Co.* v. *OSHRC*, 528 F.2d 645, 648-49 (5th Cir. 1976).

fied, 392 U.S. 901 (1968), this Court held that federal courts should not stand aside and blindly affirm administrative decisions that are inconsistent with statutory mandates or that frustrate the congressional policy underlying a statute. Judicial scrutiny is necessary to ensure that congressional intentions are carried out and that procedural safeguards are observed. *Bowels* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945).

Critical review of TECA decisions is particularly important in light of the criticism that DOE has repeatedly failed to comply with well established procedural requirements.[13] Representatives of parties litigating TECA cases have expressed concern that their clients have not received fair hearings before TECA.[14] A close observer of TECA has reported that it only rarely requires agency adherence to minimal procedural standards:

> A review of the decisions of the TECA supports the conclusion that the court has shown little concern for "principled fairness." The TECA has abdicated its judicial responsibility by its deference to administrative agencies, its failure to secure agency compliance with procedural safeguards and its unwillingness to closely scrutinize the series of emergency economic regulatory programs which were spawned during the 1970's.[15]

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[13] Burke, *Report to ABA Economic and Resources Controls Committee on Economic Stabilization Program Litigation*, 32 Bus. Law. 1259, 1271 (1977).

[14] *See* American Bar Association, Administrative Law Section, *Recommendations and Report to the House of Delegates, American Bar Association: Report on Appellate Review for Emergency Programs* 11 (1984).

[15] Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 Duke L.J. 113, 151 (footnote omitted).

TECA may be overly deferential to DOE because of its frequent review of DOE's price control regulations.[16] That TECA may devine the regulatory intent does not automatically insure that the regulations actually have the requisite clarity to serve as a guide to corporate action. TECA itself has observed that "it is difficult, even for experts, to understand these complex regulations, as is evidenced by the frequent correction, modification, change and clarifying rulings . . ." [17]

In this case, without a trial on the merits, TECA summarily affirmed the agency's application of newly interpreted price control regulations even though, as described above, (1) such retroactive application offended the regulations' statutory purpose, (2) the agency repeatedly failed to adhere to its own regulations and (3) the record evidences that factual issues were in dispute. For these reasons, this Court should grant Exxon's Petition for Certiorari.

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[16] TECA has exclusive jurisdiction of all petroleum price control cases arising under the Emergency Petroleum Allocation Act of 1975, *as amended*, 12 U.S.C. § 1904 note (1980), and the Economic Stabilization Act of 1970, *as amended*, 15 U.S.C. §§ 751-56 (1983). Although both these Acts have now expired, petroleum price control cases continue to be litigated under them. The Economic Stabilization Act of 1970, *as amended*, expired in 1973. 12 U.S.C. § 213 (1980). And in 1981 the President by executive order cancelled the sections pertaining to petroleum price control in the Emergency Petroleum Allocation Act of 1975, *as amended*. Exec. Order No. 12287, 46 Fed. Reg. 9909 (1981).

[17] *Longview Refining Co.* v. *Shore*, 554 F.2d 1006, 1023 (Temp. Em. Ct. App. 1977), *cert. denied*, 434 U.S. 836 (1977).

CONCLUSION

An agency may not retroactively reinterpret ambiguous regulations to the substantial detriment of individuals and businesses. TECA's affirmance of such agency decisions violates fundamental principles of due process. The Chamber respectfully urges this Court to grant this Petition to protect Exxon's fundamental rights, and to insure that DOE's administration of petroleum allocation and price control regulations follows well-established administrative standards and remains subject to effective judicial oversight.

Respectfully submitted,

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Supreme Court, U.S.
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Nos. 85-429, 85-430, 85-432, 85-440 and 85-444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EXXON CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

---

BRIEF FOR THE STATE RESPONDENTS IN OPPOSITION

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December 23, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Did the District Court abuse its discretion under § 209 of the Economic Stabilization Act of 1970, as amended, in formulating a remedy for overcharges modeled on previous restitutionary legislation, where the spreading of the consequences of the violation to consumers throughout the economy made it impossible to determine the injuries of individual victims?

2. Do any of the petitioners raise a substantial question that the District Court erroneously denied them any procedural right?

LIST OF JURISDICTIONS JOINING IN THIS BRIEF

We accept the listing of parties below as set forth in the respective petitions; however, we here specifically list the jurisdictions which join in this brief.

Alabama
Arkansas
California
Colorado
Connecticut
Delaware
District of Columbia
Georgia
Guam
Hawaii
Idaho
Illinois
Indiana
Iowa
Kansas
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Mississippi
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
New York
North Carolina
North Dakota
Ohio
Oregon
Pennsylvania
Puerto Rico
Rhode Island
South Carolina
South Dakota [1]
Tennessee
Texas
Utah
Vermont
Virgin Islands
Virginia
West Virginia
Wisconsin
Wyoming

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[1] South Dakota joins in the brief as *amicus curiae* pursuant to Rule 36.4 of this Court.

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Respondents.

On Petitions for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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BRIEF FOR THE STATE RESPONDENTS IN OPPOSITION[1]

COUNTERSTATEMENT OF THE CASE

This is an action brought by the United States under § 209 of the Economic Stabilization Act of 1970 ("ESA"),

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[1] This brief is filed on behalf of the States and other jurisdictions listed on p. ii, *supra*. Although we maintain that the courts below correctly resolved all questions of liability (including amount) in favor of the United States and against the Exxon Corporation ("Exxon"), because of the limited scope of the intervention which we were granted below, this brief does not respond to Exxon's petition for certiorari (No. 85-429), which presents no question concerning the distribution of the amounts for which Exxon was held liable.

The opinions below will be cited to the Appendix to the Exxon petition ("Exx. App.").

as amended,[2] against Exxon Corporation, alleging that the prices Exxon charged beginning in January 1975 for crude oil produced from the Hawkins Field Unit ("HFU") in Texas exceeded the maximum prices permitted by law. The District Court found in favor of the United States on the issue of liability. In fashioning an equitable remedy under § 209, the District Court accepted the Government's contention that, "[d]ue to the pervasive reach of oil price regulation at the time these overcharges occurred, . . . the overcharges worked their way throughout the economy nationwide to the *millions of ultimate consumers of petroleum products*," [3] and ordered Exxon "to make restitution of the full amount of the overcharges, plus interest, to the [United States] Treasury" [4], to be held in trust for immediate redistribution to the States,[5] in proportion to each State's share of nationwide consumption of petroleum products, for expenditures on energy-related programs designed to benefit their injured citizens.[6] TECA, which has exclusive appellate jurisdiction in all ESA and EPAA matters (see ESA § 211), affirmed the District Court's Order.

Four petitions for certiorari, in addition to that of Exxon, have been filed by intervenor-parties at virtually every level of distribution and use of petroleum products,

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[2] 12 U.S.C. § 1904 note, as incorporated by § 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), as amended, 15 U.S.C. § 754(a)(1). In relevant part, § 209 of the ESA provides that a court may "order restitution of moneys received in violation of any . . . order or regulation [under this Title]."

[3] Exx. App. 239a (emphasis added).

[4] Exx. App. 254a.

[5] As used herein, the term "States" refers to all fifty States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico and the Virgin Islands.

[6] Exx. App. 255a-256a.

from refiners to an individual motorist.[7] All challenge the District Court's restitutionary order and contend that awards should instead have been made to them (and to the classes which some purport to represent).

A. The Regulatory Program

The District Court's Order and TECA's affirmance rest squarely on the regulatory program which these decisions implement: we therefore begin by describing that program.

The EPAA, 15 U.S.C. § 751 *et seq.*, directed the President to promulgate regulations implementing price and allocation controls on petroleum and petroleum products, and further directed, in relevant part, that:

> [i]n specifying prices (or prescribing the manner for determining them), the regulation shall provide for (A) a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products to all marketers or distributors at the retail level . . . [EPAA, § 4(b)(2), 15 U.S.C. § 753(b)(2)]

"Passthrough" is the key word in this passage and the cornerstone of the implementing regulations. From their

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[7] The four petitions were filed by: Marathon Petroleum Company, Mobil Oil Corporation, Murphy Oil Corporation, Ashland Oil, Inc., Pennzoil Company, Tenneco Oil Company, and Tosco Corporation (collectively "Marathon") (No. 85-430); Air Transport Association of America, Petroleum Marketers Association of America, The Jobbers' Group, and Independent Gasoline Retailers (collectively "ATA") (No. 85-432); Philadelphia Electric Company ("PECO") (No. 84-440); and National Freight Inc., RJG Cab Co. Inc., and Geraldine H. Sweeney (collectively "National Freight") (No. 85-444). These petitions and their appendices are referred to hereafter, respectively, as, "Mar. Pet." and "Mar. App.", "ATA Pet." and "ATA App.", "PECO Pet." and "PECO App.", and "Nat. Frt. Pet." and "Nat. Frt. App." The 45-volume Record of proceedings in the District Court as filed in the TECA will be referred to by volume number and page number as "— R. —."

adoption on January 14, 1974,[8] until all petroleum products were decontrolled on January 28, 1981,[9] the regulations promulgated pursuant to the EPAA permitted refiners, crude oil resellers and petroleum product resellers to pass through to their customers their net increases in crude oil costs for refined petroleum products, together with their increased costs of purchased refined products and certain "non-product" costs.[10] On August 30, 1974, the Department of Energy's ("DOE") predecessor agency, the Federal Energy Administration ("FEA"), published a Notice of Proposed Rulemaking concerning the Old Oil Allocation ("Entitlements") Program.[11] FEA stated that "[t]he objective of the entitlements program proposed is to achieve the equitable distribution of the low priced old oil among all sectors of the petroleum industry . . . ." (39 *Fed. Reg.* at 31650). FEA also commented that "[u]nder the proposal, all money spent or received as the result of the purchase or sale of entitlements would be passed through to consumers, either as a cost increase or decrease, respectively." (*Id.*).

Effective November 29, 1974, FEA adopted regulations instituting the Entitlements Program.[12] In keeping with the Congressional mandate that there be "dollar-for-dollar passthrough of the net increases in the cost of crude oil," 15 U.S.C. § 753(b)(2)(A), the regulations provided that the entitlements costs or proceeds would be included in crude oil cost calculations. In upholding the constitutionality and validity of the Entitlements Program, TECA explained:

> The basic purpose of the Entitlements Program was to spread the benefit of access to old price-controlled

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[8] *See* 39 *Fed. Reg.* 1924 (1974).

[9] *See* Exec. Order No. 12287; 46 *Fed. Reg.* 9909 (1981).

[10] *See* 10 C.F.R. § 212.83(c) and (d).

[11] *See* 39 *Fed. Reg.* 31650 (1974).

[12] *See* 10 C.F.R. § 211.67 (1974).

> oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, *all regions of the country, and among all consumers of petroleum products. . . .*[13]

As TECA stated in its opinion herein, one consequence of the Entitlements Program was that if, as happened here, price-controlled crude was improperly certified as exempt (or higher priced) crude oil, the effects of the overcharges initially would be distributed among all domestic refiners; thereupon "the regulatory system was designed to insure that money spent or received by the refiners as the result of their purchases or sales of entitlements would be passed along to the ultimate consumers." [14]

B. The Proceedings Below

1. *The District Court*

On June 8, 1978, DOE instituted this enforcement action against Exxon under § 209 of the ESA, alleging that the prices Exxon had been charging since January 1975 for crude oil produced from the HFU exceeded the maximum prices permitted by law. (I R. 16). In its prayer for relief, DOE urged the District Court to order Exxon to pay the overcharges, with interest, to the United States Treasury.[15] Over the ensuing 4 years, the District Court issued 8 reported opinions and over 100 separate

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[13] *Cities Service Co.* v. *FEA*, 529 F.2d 1016, 1021 (Em. App. 1975), *cert. denied*, 426 U.S. 947 (1976) (emphasis added).

[14] Exx. App. 87a, citing *Union Oil Co.* v. *DOE*, 688 F.2d 797, 802 (Em. App. 1982), *cert. denied*, 459 U.S. 1202 (1983). See also the decision of the District Court herein quoted at p. 7, *infra*.

[15] "Plaintiff prays that this Court enter judgment in its favor upon this Complaint: . . . 3. Ordering that Exxon make restitution of moneys, in the form of payments to the United States Treasury, equal to the amount of its overpricing for first sales of crude oil from the [Hawkins Field Unit];" (I R. 33).

orders, and TECA issued 3 reported opinions on interlocutory appeals brought by Exxon.

On August 27, 1982, DOE and Exxon filed cross-motions for summary judgment presenting both liability and remedy issues for decision. On November 24, 1982, five weeks *after* oral argument on the summary judgment, a group of 6 refiners, including 4 of the 7 petitioners in No. 85-430, and a trade association representing other refiners ("Indicated Refiners") filed a "Conditional Motion . . . To Intervene" in which they argued, as Exxon had, that "it is impossible to trace the impact of the overcharges," and that, based upon precedent in private antitrust damage actions, refiners should receive the entire overcharge fund (XLV R. 38973). Some three months *after* oral argument, 5 gasoline station operators ("Gasoline Retailers"), purporting to represent 187,000 independent branded retailers throughout the United States, filed a motion for limited intervention in the District Court; they urged that the "impact of the overcharge" should be traced through the DOE Entitlements Program to the "more than 200 refiners nationwide" and then, "taking into account each refiner's banked costs" and DOE's "[c]omprehensive compliance audits", to all "purchasers of refined products throughout the period of violation" (XLV R. 38995-38997). At Exxon's request, the District Court stayed consideration of both the Indicated Refiners' and the Gasoline Retailers' intervention motions. (ATA App. A-288 and A-289.)

On March 25, 1983, the District Court issued its Memorandum Opinion holding Exxon liable for some $895 million in crude oil overcharges between January 1975 and January 1981, plus interest. The District Court determined that, as a matter of law, Exxon was required to change its accounting practices relating to Hawkins Field crude oil on January 1, 1975, and that there was no factual dispute as to its failure to do so.

In fashioning an equitable remedy under § 209 of the ESA, the District Court determined that "the overcharges worked their way throughout the economy nationwide to the *millions of ultimate consumers of petroleum products.*" [16] Following TECA's prior holding concerning the operation of the Entitlements Program, the District Court reasoned that "[j]ust as the program spread the benefit of access to old oil, so too did the program spread the burden of Exxon's overcharges among all sectors of the petroleum industry, all regions, and all consumers [of petroleum products]." [17] The District Court also referred to record evidence of Exxon's admitted understanding of this impact [18] as well as the cost-passthrough effects of DOE's price regulations.[19] It determined:

> Exxon's overcharges were not, as it simplistically asserts, borne by Exxon itself, but instead were borne by ultimate consumers of petroleum products throughout the entire country.[20]

Accordingly, the District Court found that:

> [t]he broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each.[21]

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[16] Exx. App. 239a (emphasis added).

[17] Exx. App. at 248a, citing *Cities Service Co.* v. *FEA*, p. 5 n.13, *supra*. *See also id.* at 248a-249a, quoting *Union Oil Co.* v. *DOE*, *supra*, p. 5, n.14.

[18] Exx. App. 248a-249a.

[19] Exx. App. 249a, citing 10 C.F.R. § 212.83(c)(2)(iii) and 10 C.F.R., Part 212, Subparts F and L.

[20] Exx. App. 249a. Based on this finding, the District Court initially denied the conditional intervention motion of the Indicated Refiners and the motion for limited intervention of the Gasoline Retailers. Exx. App. 249a, n.56.

[21] Exx. App. 250a.

The District Court ordered Exxon "to make restitution of the full amount of the overcharges, plus interest, to the [United States] Treasury" [22] to be held "in trust" [23] for distribution to the States, in proportion to each State's share of nationwide consumption of petroleum products, for use in energy-related programs designed to benefit their injured citizens.[24] The procedures for disbursement to the States were modeled on the Congressional enactment of § 155 of the Further Continuing Appropriations Act, 1983.[25] The District Court explained:

> *In formulating its order, the court in no way relies on Section 155 as an express statutory grant of authority to this court, but acts instead in the exercise of its broad equitable powers to order restitution.* However, Section 155 clearly bespeaks the intent of Congress that violators of the petroleum price regulations should be made to disgorge their illgotten gains even in situations, like the case before the court, where the victims of the petroleum overcharges cannot be identified. The colossal scale of Exxon's wrongdoing, and the workings of pervasive regulations to spread the burden of that wrongdoing impossibly far and wide, must not deter this court from fashioning an appropriate equitable remedy. The purpose of the domestic petroleum price regulations was to keep oil prices down, to relieve consumers of some of the burden of towering oil costs.

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[22] Exx. App. 254a.

[23] District Court Judgment, XXXV R. 31658 at 31659.

[24] Exx. App. 255a-256a. The programs are listed *infra* at p. 20, n.41.

[25] Pub. L. No. 97-377, 96 Stat. 1830, 1919, § 155 (1982) ("Warner Amendment" or the "Amendment"), reproduced at ATA App. A-316. In the Warner Amendment, Congress directed the Secretary of Energy to distribute up to $200 million in escrowed overcharge funds for energy related uses by the States in proportion to the relative consumption of both price-controlled and uncontrolled petroleum products in each State during the period in which price controls were in effect.

> The five energy conservation programs identified in Section 155 operate across the nation to reduce that same burden, either by reducing overall consumption through conservation or by direct financial assistance to those most in need. *Although one might speculate as to alternative remedies, this court respects the wisdom of the solution chosen by Congress and shall adopt it as the most appropriate equitable remedy in the circumstances of this case.* [Exx. App. 256a, footnote omitted, emphasis added.]

Thereafter 33 States and Territories and the District of Columbia were allowed to intervene to support the District Court's restitution order on appeal.[26] Six additional separate motions to intervene were filed by a joint total of 14 parties, including refiners, jobbers, utilities, a trucking company, a taxicab company, and an individual motorist. Each of these motions sought only to intervene for purposes of appeal. None moved the District Court to reopen the record on the question of the feasibility of tracing the effect of the overcharges or for a hearing on or reconsideration of any issue. The District Court granted all applications for intervention, including on reconsideration those of the Indicated Refiners and the Gasoline Retailers, for the purpose of arguing the remedy issue on appeal. (*See* ATA App. A-290 through A-298).

2. *The Court of Appeals*

On appeal, TECA unanimously affirmed the judgment of liability against Exxon. By a 2-1 vote, TECA also affirmed the District Court's remedy under § 209.

TECA rejected the contention "that the trial court was required to trace, or attempt to trace, the overcharges from first purchaser, to refiner, through various monthly accountings required by the Entitlements Program and its 'banking' system, and then to determine the nature

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[26] Subsequently, 12 additional States intervened for the same purpose before TECA.

and extent of any passthrough of increased costs through the distribution system, such as might be authorized by 10 C.F.R. Section 212.83(c)-(d) (refiners) and 212.93(a) (resellers and retailers)." (Exx. App. 85a). TECA agreed with the District Court that:

> any attempt to trace the overcharges would be doomed to failure because of the pervasive influence of the Entitlements Program and other regulations which had the effect of passing on and diffusing the HFU overcharges through the distribution system. [Exx. App. 86a-87a.]

TECA explained the consequences of the Entitlements Program whereby overcharges would be passed along to the ultimate consumers (Exx. App. 87a; *see* pp. 3 to 5, *supra*) and continued:

> We agree with the trial court's conclusion that any attempt to trace increased costs attributable to the HFU overcharges would require a full scale audit of the entire petroleum industry, and that any effort to do so would be futile. As the Government suggests, the first step in any such audit would require recalculating over seventy monthly entitlement lists issued during the period of the overcharges, taking into account such variables as the volumes of new and old oil produced during each month, the average acquisition costs, and the values of each entitlement. In determining the precise impact of the overcharges on any particular refiner, it would then be necessary to consider the impact of exception relief which may have been granted by the agency over the term of the Entitlements Program.
>
> * * *
>
> Even if the HFU overcharges could be traced to individual refiners, it would then be necessary to trace their effect on product resellers, retailers and consumers, through the provisions of passthrough regulations. That this task would be futile is illustrated by the difficulty of applying only one aspect of the regulations, that is, the calculation of "banked

costs." Exxon itself admitted that it was unable to supply information on its own costs. . . .

* * *

The fact that banked costs might exist as to any particular refiner does not mean of course that increased costs were not passed on through the distribution system. To determine this would require an investigation into the state of mind of each refiner in setting prices for individual petroleum products each month. Such a task would be impossible, and several of the intervenors have so conceded. [Exx. App. 88a-90a.]

TECA rejected the refiners' suggestion "that refunds be made payable to themselves as 'first purchasers' [because] that would result in inequities, inconsistent with the fundamental purpose of restitution under Section 209." (Exx. App. 90a). Moreover, TECA ruled:

There was no need for the District Court in this action to attempt the impossible task of attempting to ascertain the damage sustained by individual consumers of petroleum products. In this respect, it should be noted that this action for restitution under Section 209 differs in significant degree from a private action of damages under Section 210 [Exx. App. 90a-91a.]

In conclusion, TECA approved the "form of relief chosen by the trial court in this action by which the restitution funds will be channeled through the states for use in the enumerated energy programs designed to benefit the consuming public . . . ." (Exx. App. 91a):

We believe this form of disbursement to be equitable, and fair, and a reasonable method of compensating the consuming public for the HFU overcharges. It accomplishes the intent of Congress that violators of the price regulations be required to disgorge their gains, even in situations where it may not be possi-

> ble to identify and compensate each individual victim. While other remedies might have been adopted by the trial court, the remedy chosen avoids further administrative delay and confusion, with additional costs, it prevents the frustration of congressional objectives in securing prompt enforcement of what has been denominated as "emergency" price regulations, and it is a reasonable means to protect the public interest. [Exx. App. 91a-92a, footnote omitted.]

Petitions for rehearing and/or suggestions for rehearing *en banc* filed by Exxon and several intervenor appellants were denied. (Exx. App. 269a-270a). On October 23, 1985, TECA denied a motion by Marathon, Mobil and Murphy for leave to file a second petition for rehearing.

REASONS FOR DENYING THE PETITIONS

The several petitions filed herein uniformly fail to demonstrate that there are, as Rule 17 requires, "special and important reasons" for this Court to grant another round of review of the District Court's exercise of its equitable discretion in formulating a restitutionary remedy for this case. The remedy chosen rests on the District Court's reasoned conclusion—based upon the regulatory scheme and the voluminous record before it—that the consequences of Exxon's overcharges were spread throughout the economy so that individual victims and amounts of injury cannot possibly be identified and that, ultimately, all oil products consumers nationwide suffered as a result of the overcharges. Accordingly, the District Court fashioned a well-grounded remedy to benefit those ultimate consumers.

In turn, TECA, "a court intimately familiar with the intricacies of federal energy regulations," (*Tully* v. *Mobil Oil Co.*, 455 U.S. 245, 248 (1982)), and empowered with exclusive appellate jurisdiction in these matters, agreed with the District Court's findings, and approved its choice

of remedy as "equitable, and fair, and a reasonable method of compensating the consuming public for the . . . overcharges". (Exx. App. 91a). In so ruling, TECA observed that "other remedies might have been adopted by the trial court" (Exx. App. 92a), and thus refrained from limiting future decisions in similar cases. Thus, far from deciding any "important question of federal law which has not been, but should be settled by this Court", it merely applied its long experience with and expertise in the regulatory mechanism it supervises to confirm that the District Court's restitutionary choice not only fell within the broad equitable discretion which prior opinions of this Court and TECA had already settled, but was a commendable exercise of that discretion in the complex context of the particular regulatory violation at issue, where identification of individual injury among many millions of potential claimants was impossible. Petitioners' attempt to narrow this discretion, and to have this Court require the trial court in every case to attempt identification of individual injury even where that task is impossible, lacks both logic and precedent.

Finally, the petitioners' various contentions that they were improperly denied procedural rights are wholly without merit. The only petitioners who sought intervention in the District Court prior to the entry of judgment did so well after final oral argument on the summary judgment motions, and their intervention papers merely added reasons for a finding of impossibility, as described above. All other petitioners requested—and were granted—intervention only for purposes of appeal. Thus, there has been no departure "from the accepted and usual course of judicial proceedings" requiring further review by this Court.

I. TECA'S AFFIRMANCE OF THE DISTRICT COURT'S EXERCISE OF ITS EQUITABLE DISCRETION RAISES NO ISSUE WARRANTING FURTHER REVIEW BY THIS COURT

A. Because Section 209 Of The ESA Vested The District Court With Broad Equitable Powers, The Scope Of "Appellate Review Is Correspondingly Narrow"

Section 209 of the ESA, under which the United States brought this suit against Exxon, provides that, in addition to the power to issue mandatory injunctions granted therein, "the court may also order restitution of moneys received in violation of any . . . order or regulation [under this Title]." The District Court was thus vested with broad discretionary power.[27] As Justice Harlan wrote in *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960):

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.

Justice Harlan also quoted with approval and followed this Court's decision on the scope of equitable jurisdiction under § 205(a) of the Emergency Price Control Act of 1942, *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946):

> Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a pro-

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[27] Exx. App. 86a; *Citronelle-Mobile Gathering, Inc.* v. *Edwards*, 669 F.2d 717, 721-722 (Em. App.), *cert. denied*, 459 U.S. 877 (1982); *Sauder* v. *DOE*, 648 F.2d 1341, 1348 (Em. App. 1981).

> ceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake . . .
>
> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Brown* v. *Swann*, 10 Pet. 497, 503. [361 U.S. at 292, quoting 328 U.S. 397-398].

These decisions give special force herein to a corollary of the trial court's "broad discretionary power" in shaping equity decrees—that "appellate review is correspondingly narrow." *See Lemon* v. *Kurtzman*, 411 U.S. 192, 200 (1973) (Op. of Burger, C.J.). *A fortiori*, where as here, the Court of Appeals has approved as "equitable, and fair, and . . . reasonable" the District Court's exercise of its equitable jurisdiction, only a most compelling showing of abuse could justify a second round of review by this Court. No such showing has been made by any of the petitioners herein.[28]

B. The Remedy Chosen By The District Court Was Well-Grounded In Fact And Law

1. The Record And Regulatory Scheme Made It Clear That It Was Impossible To Trace The Impact Of Exxon's Overcharges To Individual Victims

The District Court found, on the basis of the record before it: "The broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of

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[28] Petitioners are not identically situated substantively or procedurally. Where pertinent in this discussion, we will identify particular petitions or petitioners. Otherwise, the term "petitioners" will mean some or all of those identified in n.7, *supra*.

the overcharges to their ultimate victims and the calculation of the precise damages suffered by each." (Ex. App. 250a).[29] (See p. 7 *supra*). TECA "agree[d] with the trial court that any attempt to trace increased costs attributable to the HFU overcharges would require a full-scale audit of the entire petroleum industry, and that any effort to do so would be futile." (Exx. App. 88a). It explained that conclusion by detailed examination of the regulatory scheme, about which it has developed special expertise in the exercise of its exclusive appellate jurisdiction.

Petitioners point to no evidence which was in the record before the District Court which contradicts, let alone renders unreasonable, the District Court's and TECA's conclusion that the ultimate victims of Exxon's overcharges and the extent of their individual injuries cannot be ascertained in any manageable proceeding. Nor did any of the petitioners offer to present such evidence to the trial court in motions to intervene or otherwise. Here, however, they rely on a 1985 report by DOE's Office of Hearing and Appeals (the "OHA report") in a separate, ongoing proceeding.[30] That report, obviously,

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[29] The tracing issue was vigorously litigated before the District Court entered judgment. As that court observed, in order "to postpone its day of reckoning" Exxon had argued:

> that it must be allowed to conduct further discovery to determine if the Entitlements Program in fact operated as it was designed and to trace the Hawkins Field overcharges to their ultimate victims. In effect, Exxon would like to launch a nationwide inquiry into the workings of more than 200 domestic refiners during a period of several years. [Exx. App. at 247a-248a.]

[30] Report of the OHA to the United States District Court for the District of Kansas in *Department of Energy Stripper Well Exemption Litigation* (*"Stripper Well Litigation"*), M.D.L. No. 378, reproduced in ATA App. at A-320. Although OHA's factfinding in the *Stripper Well Litigation* should have no bearing upon the correctness of the District Court's earlier findings in this case, based upon the record at the time judgment was entered, the States note

was not before the District Court when it rendered its decision or thereafter. In fact, the OHA report was issued on June 21, 1985, more than a year after oral argument of this case before TECA and less than two weeks before TECA issued its opinion affirming the District Court.[31] The District Court's finding cannot be overturned on the basis of a report which was not before it.[32] Nor can it be overturned on the basis of a criticism of that report,

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that, like the District Court here, the recent report found, after nearly two years of effort, that:

> it is impossible to trace these increased costs [of crude oil to all domestic refiners] through an individual refiner's refining, distribution and marketing operations. In fact, no party sought to establish such a tracing in the context of this proceeding, or suggested a valid tracing methodology based on inspection of an individual refiner. [ATA App. A-339.]

[31] ATA's assertion that the "very facts" which it alleges concerning the possibility of tracing "appear *in the instant record* in the form of a detailed fact finding report by the OHA" (ATA Pet. 14) is, therefore, incorrect. Indeed, when the OHA report was submitted to TECA that court was careful to provide only "that the Report of OHA of June 21, 1985 be filed in the Office of the Clerk of this Court." Order Denying Without Prejudice Motion To Permit Parties To File A Supplemental Brief On The Significance Of The June 21, 1985 OHA Report And Granting Leave To File The Report. (ATA App. at A-189.)

[32] Indeed, the Kansas district court has not yet decided whether to adopt the OHA report. Moreover, in relying on that report for the proposition that it would be feasible to trace the injuries of the victims of the overcharges, petitioners fail to take due account of the two serious deficiencies which that report itself acknowledges:

First, the report rests on assumptions and estimates which it admits are subject to valid criticism. It is, in its own terms, only one theoretical estimate of the impact on the refining industry as a whole if a particular set of contested assumptions is applied.

Second, as the report states, *no methodology exists by which to determine the impact on any particular refiner, much less downstream customers of any refiner or direct purchaser*. *See* n.30, *supra*; ATA App. at A-346, A-380 to A-381.

as three refiners remarkably argue in a supplemental brief.[33]

2. *The Restitutionary Remedy Selected By The District Court Was Equitable, Fair and Reasonable*

The District Court's decision to look to the Warner Amendment (also referred to as "§ 155") as the model for its choice of restitutionary distribution to benefit consumers was a sound exercise of its discretion since "the victims of the petroleum overcharges cannot be identified." (Exx. App. 256).[34] Three points about the Amendment are especially noteworthy. First, Congress stated that where particular injured individuals "cannot be *reasonably* identified," or their injury "is too small to be capable of *reasonable* determination," a refund for energy related purposes through the States is one which is "*reasonably* expected to benefit the class of persons injured." § 155(a) (emphasis added).[35] Second, in choosing a State-

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[33] *See* Supplemental Brief of Petitioners Marathon, Mobil, and Murphy in Support of Petitioners (No. 85-430). The materials which that brief presents concerning a controversy over various drafts of the OHA report are, of course, entirely outside the record which was before the District Court and before TECA when it affirmed. It is a measure of these petitioners' desperation that they must rely on such materials, and on the contention that OHA's supposed bias creates a due process issue under *Tumey* v. *Ohio*, 273 U.S. 510 (1927), in order to seek review of a judgment which did not in any way depend on the OHA report.

[34] Because of the change of circumstances resulting from decontrol in 1981, previous mechanisms for passing refunds along the distribution chain to ultimate consumers no longer exist. Thus, as TECA stated, refunds to first purchasers would "result in inequities inconsistent with the fundamental purpose of restitution under § 209." (Exx. App. 90a).

[35] *See, e.g.*, 128 Cong. Rec. S15116 (daily ed. Dec. 16, 1982) (statement of Senator Percy):

> This money would come from $200 million now in escrow which has been collected from oil company overcharges to consumers during the seventies. This money rightfully belongs to the con-

based remedy, Congress necessarily found that paying such funds to the States, in proportion to their oil product consumption and on behalf of their injured citizens for energy related purposes, is "restitutional." *Id.* Third, in adopting the Amendment, Congress confirmed the propriety of DOE's repeated use of the State remedy to benefit ultimate consumers,[36] and accelerated what DOE had been intending to do with escrowed overcharge funds even without Congressional action, *i.e.*, distribute funds to States on behalf of ultimate consumers.[37]

The petitioners' primary disagreement with the District Court's remedy is, of course, that they would prefer to receive the money themselves. While they do raise objections directed specifically to the use of the Warner Amendment, these do not have any merit.

a. Petitioners argue that the District Court should not have turned to the Warner Amendment as a model be-

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sumers who were actually overcharged during this period. But because it is impossible to identify each individual consumer, we should at least attempt to place this money where consumers in general will benefit. Distribution to the States provides the quickest means to get this money out.

[36] *See e.g., Alfred B. Alkek*, 9 DOE ¶ 82,521, at p. 85,134 (1982) ("We chose to distribute the money to state governments because we believed that they would be able to design a distribution scheme for the refund proceeds which would benefit all injured consumers in each state, and account for the varying energy-related needs of their citizens. We also believe that the states would be able to expend the proceeds in an administratively efficient and cost-effective manner."); *Adams Resources and Energy, Inc.*, 9 DOE ¶ 82,553 at p. 85,292 (1982).

[37] In proposing the Amendment, Senator Warner stated: "The Department of Energy is seeking to provide secondary remedies to State governments and is currently reviewing a distribution plan which I understand is consistent with this amendment." 128 Cong. Rec. S15115 (daily ed. Dec. 16, 1982). *See also* 128 Cong. Rec. S15701 (daily ed. Dec. 20, 1982) (statement of Senator Kennedy): "DOE has in part been proceeding in this fashion. It is the most appropriate method of providing restitution for the injuries suffered by the consumer."

cause the Amendment provided only for a one-time distribution of funds. The argument overlooks the court's clear statement that it was "in no way rel[ying] on Section 155 as an express statutory grant of authority to this court but [was acting] instead in the exercise of its broad equitable power to order restitution." (Exx. App. 256a, quoted at p. 8, *supra*).[38] Congress' decision not to *compel* future distribution on the basis of the Warner Amendment formula[39] cannot be taken as precluding a court of equity from choosing to do what Congress had done and for similar reasons.[40] "Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *DeMario Jewelry*, 361 U.S. at 291, *quoting Porter*, 328 U.S. at 398; *see also Hecht Co.* v. *Bowles*, 321 U.S. 321, 330 (1944).

b. Some petitioners present undocumented assertions that they will not receive any benefit at all from the programs which the States must fund under the District Court's order.[41] While there is no requirement that the

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[38] This fact renders frivolous the assertion of the National Freight petitioners that by selecting the approach of the Warner Amendment, the District Court violated the constitutional separation of powers. (Nat. Frt. Pet. 13-14, 21-22).

[39] The Senate-passed version made the Warner mechanism *mandatory* in all future cases. *See* 128 Cong. Rec. S15117 (daily ed., Dec. 16, 1982).

[40] Petitioners rely especially on the comments of Congressman Dingell as forbidding any use of the Warner Amendment as precedent; but, where, as shown above, the statute on its face makes clear Congress' view that its own remedy was reasonable and restitutionary, a court may accept the soundness of that judgment.

[41] The five Federal energy conservation programs involve (1) weatherization of buildings (*see* 42 U.S.C. § 6861 *et seq.*); (2) implementation of State energy conservation programs (*see* 42 U.S.C. § 6321 *et seq.*); (3) reduction of energy consumption in, or the funding of alternate energy sources for, schools and hospitals (see 42 U.S.C. § 6371 *et seq.*); (4) promotion of conservation by small businesses and individuals, (*see* 42 U.S.C. § 7001 *et seq.*); and (5)

remedy adopted by the court directly benefit each person who was injured by the overcharges, it is plain that petitioners' view of these programs is far too narrow. For example, State energy conservation plans are intended to reduce total energy consumption by all citizens and businesses within the State. *See* 42 U.S.C. § 6322(a)(1).[42] A reduction in demand can lower oil product prices, benefitting all buyers, especially commercial users, in proportion to consumption, and in long-range terms will reduce the dangers of harmful energy shortages. Moreover, the provisions which are listed in the District Court's order are sufficiently broad and flexible to permit funding of programs which would quite specifically benefit businesses such as those represented by various petitioners. Without attempting to be exhaustive, we note in the margin some possibilities which readily come to mind.[43]

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assistance to low-income people in paying home utility bills (*see* 42 U.S.C. § 8621, *et seq.*). *See* Exx. App. 255a, n.58.

[42] To achieve that goal, the plans are *required* to promote more efficient lighting for public buildings and thermal efficiency standards and insulation requirements for new and renovated buildings. 42 U.S.C. § 6322(c). The States are further permitted to adopt transportation controls, programs of public education, and "any other appropriate method or programs to conserve and to improve efficiency in the use of energy." 42 U.S.C. § 6322(d)(5).

[43] State energy conservation plans are intended to be coordinated with the operation of State energy extension service plans, 42 U.S.C. § 7005(h), which in turn allow the States to provide on-site energy use evaluations and recommendations to consumers and businesses, including information about the availability of aid for "planning, financing, installation, and effective monitoring of energy-related facilities and activities." 42 U.S.C. § 7004(b)(6) and (b)(7). Airports and airlines could seek aid for airport improvements to reduce fuel burning caused by delays in landing time under these provisions. Part 450 of 10 C.F.R. contains a list of energy conservation measures already approved by DOE for implementation by State energy extension services with both residential and industrial applications, including, for example, audits, insulation measures, control systems and installation of high efficiency

In short, it was fully appropriate for the District Court to look "at the policy of the legislation and fashion[] a remedy that will effectuate that policy," *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957), and in doing so, (as the District Court said) to "respect[] the wisdom of the solution chosen by Congress and [to] adopt it as the most appropriate equitable remedy in the circumstances of this case." (Exx. App. at 256a).

3. *TECA's Decision is Entirely Consistent With This Court's Decisions*

TECA in this case and in its prior decisions has fully attended to this Court's major teaching in *Porter* v. *Warner Holding Co., supra*, that in these public enforcement cases, courts should exercise broad and flexible powers to do equity.[44] Nevertheless, citing private damage action precedents, and ignoring *Porter's* distinction between such private actions and public restitution actions,[45] petitioners argue that *Porter* restricted the scope of equitable jurisdiction, and required individual injury determinations in every overcharge restitution case. They do so by tearing out of context the concluding paragraph of the *Porter* opinion, from which they quote.[46] That paragraph

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equipment. These are precisely the type of efforts in which many utilities already engage and which the States could help finance under the remedy adopted by the District Court.

[44] *See Citronelle-Mobile* and *Sauder*, p. 14, n.27, *supra*.

[45] "Restitution, which lies within that equitable jurisdiction [granted by § 205(a) of the 1942 price control Act] is consistent with and differs greatly from the damages and penalties which may be awarded under § 205(e)." 328 U.S. at 402.

[46] Marathon's argument that by "restitution, Congress meant the refund of overcharges to the party injured" as in *United States* v. *Lieb*, 333 F. Supp. 424 (W.D. Tex. 1971), *aff'd*, 462 F.2d 1161 (Em. App. 1972) (Mar. Pet. 15), is wholly without merit. Where Congress takes pain to confirm an expressly "inherent equitable power" of historically large scope, its action is not to be construed as nar-

set forth the trial court's authority and responsibility on remand to resolve "conflicting claims and counterclaims between tenants and landlord as to the amounts due . . ." (328 U.S. at 403). The "interested parties" whom the trial court was instructed to bring in, if necessary, were the tenants against whom the landlord had such counterclaims, a small and readily ascertainable class.[47] The purpose of bringing them in was not to allow them to assert claims for restitution (which the Secretary was doing on their behalf) but to enable the court to adjudicate any "counterclaims" against them by the landlord.

Because "[t]he broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each," [48] the teachings of *Porter* which are truly applicable in this case are those which forcefully affirm the broad powers of the courts of equity to fashion a restitutionary remedy, *see* pp. 14 to 15, *supra.* Petitioners' insistence that proceedings were required which would enable them, and the literally countless other persons and entities who were similarly

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rowing the courts' discretion by requiring them to conform to the particular circumstance of a case which is cited in the legislative history to illustrate that the power already exists.

[47] This portion of the *Porter* opinion was a response to the landlord's argument, based on evidence that he "may have valid counterclaims against certain tenants for damage to or theft of its property." (Br. for Warner Holding Co., No. 793, Oct. T. 1945, p. 36, quoting 60 F. Supp. 513, 520.) This Court's opinion answered the trial court's question: "Could this court, without a jury, adjudicate the amount of restitution in each of the twenty rental units involved here, some of which have had several different tenants, without the tenants before it and without the defendant having an opportunity to interpose valid counterclaims as a defense?" (*Id.*) This Court held that a court of equity did have the power to adjudicate the counterclaims and to bring the tenants before it for that purpose.

[48] Exx. App. at 250a.

situated, to prove their individual injuries in order that they may be compensated, cannot be reconciled with those teachings. Indeed, as the District Court recognized, adoption of the petitioners' position would, as a practical matter, nullify the restitutionary remedy "because DOE [or a court] could never accurately determine the losses suffered by any one claimant." (Exx. App. at 253a.)

The decision below is also entirely consistent with *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949). While *Interstate* directed the federal court to make a "prognostication" as to what would in fact have happened as a consequence of federal or State law if the stay had not been issued (*id.* at 584), it was evidently anticipated that this task could readily be accomplished:

> Distribution of the fund should not involve prolonged litigation. It is an administrative matter involving the exercise of an informed judgment by the federal court and should have the flexibility and dispatch which characterize the administrative process. [*Id.*]

Here, by contrast, the courts below have found that allocating the fund among the potential individual claimants is "impossible." (Exx. App. 86a-91a, 247a-151a).[49]

Surprisingly, since this Court does not sit to resolve intracircuit conflicts, petitioners attempt to make much of a supposed inconsistency between the decision below

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[49] Some petitioners place particular reliance on a portion of Justice Frankfurter's separate concurring opinion. In so doing, they omit the concluding sentence of the paragraph from which they quote: "It will be time enough to distribute the fund by some makeshift rule of thumb if what is concededly a rule of intrinsic fairness should be found judicially unenforceable." (336 U.S. at 590). Justice Frankfurter recognized that even a "makeshift rule of thumb" would be preferable to imposing upon the lower court a duty which it could not perform; here, no "makeshift" rule was needed since there existed a model well grounded in Congressional and administrative example.

and that in *Citronelle-Mobile Gathering, supra.* In so doing, petitioners simply disregard TECA's careful and detailed explanation (Exx. App. 85a-87a) of why "the District Court's judgment and Order . . . are fully in accord with our ruling in *Citronelle* . . . ." (*Id.* 85a).

II. NONE OF THE PETITIONS PRESENTS A PROCEDURAL ISSUE WARRANTING REVIEW

Petitioners present an array of procedural objections to the District Court's decision, invoking variously Rules 24 (intervention) and 56 (summary judgment) of the Federal Rules of Civil Procedure and the Due Process Clause of the Fifth Amendment. Their common objection, whatever the form of their individual arguments, is that the District Court should have granted them a hearing on the issue of remedy. A close examination of the proceedings below and of the respective petitions shows that none of the petitioners present a procedural issue meriting review.

A. At the outset, it is essential to recall that most of the parties that are now petitioners here sought leave from the court to intervene *only for the purposes of appeal.* This was true of all the parties who moved to intervene after the court issued its decision—specifically three of the refiners who petition in No. 85-430 (Marathon, Mobil and Murphy); all parties to the ATA petition (No. 84-432) except the Gasoline Retailers (specifically ATA, Petroleum Marketers and Jobbers); as well as PECO (No. 85-440); and all parties to the National Freight petition (No. 85-444) (National Freight, RJG Cab and Sweeney). These parties did not move the District Court for leave to adduce any evidence to refute any of the findings which the court had made or otherwise to reconsider its decision. In short, since the District Court granted the postjudgment movants all the intervention which they sought, they cannot now assert that the court denied them any procedural rights.

B. This leaves to be considered only the procedural objections of the prejudgment (but post-oral argument) movants, the Indicated Refiners and the Gasoline Retailers.

1. Four of the refiners who were parties to the Indicated Refiners' prejudgment motion to intervene have joined in the Marathon petition;[50] that petition raises two related procedural issues. (Mar. Pet. i).

The first is that the District Court should have given notice and an opportunity to be heard to all potential claimants. That issue is insubstantial. The court could not possibly provide notice or an opportunity to be heard to all such persons, which include not only the present intervenors, but all others similarly situated, including, for example, 187,000 gasoline retailers and tens of millions of individual motorists. The refiners have asserted that *they* were injured and were unable to pass through all of the overcharges, but not that other persons such as consumers bore none of the burden. Moreover, as the refiners recognize, TECA ruled that such notice was unnecessary "on the theory that actual overcharges are incapable of judicial proof." (Mar. Pet. 20). They now contend—and this is the second part of the question which they present—that "that 'finding' is pure speculation." (*Id.*).

As shown above, however, the District Court's finding was fully substantiated in the Court's analysis of the regulatory framework and the particular record before it, the issue having been pressed by Exxon. Even more important for present purposes, the refiners cannot ask this Court to review that finding because, far from proffering any contrary evidence, they conceded the impossibility of tracing the overcharges below. In the District Court the Indicated Refiners asserted that "it is impossible to trace the impact of the overcharges directly to

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[50] They are Ashland, Pennzoil, Tenneco and Tosco.

any subsequent purchasers." (XLV R. 38973). Before TECA, the other refiners who here join in the Marathon petition asserted that with respect to both controlled and uncontrolled petroleum products that it would be impossible to determine whether or not the refiners absorbed or passed on the overcharges.[51]

The refiners so argued because their position in the courts below was that the rule in antitrust damage suits under *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) should be applied by analogy. They argued that in providing a remedy under § 209, the District Court was bound to award restitution to the first purchaser without regard to actual injury, as TECA had done in certain circumstances in private § 210 damage suits. TECA rejected that restrictive view of § 209 (Exx. App. 90a) and the question presented in the Marathon petition does not challenge this basis for denying the refiners' claim. That is, of course, a separate and independent ground for denying the refiners' petition.[52]

2. The Gasoline Retailers present no question or argument relating to the fact that their motion to intervene

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[51] Brief of Intervenor-Appellants Marathon Petroleum Company, *et al.*, at 16-17. This statement by Marathon, *et al.* and that of another refiner which is not a petitioner here were cited by TECA in making the very ruling which the refiners now challenge. *See* Exx. App. 90a, quoted at p. 11, *supra*.

[52] In the closing footnote of their petition, the refiners say that, if the lower courts had applied the principles of the above-cited decisions, "*the impossibility of proving the absorption or pass on of overcharges in transactions subsequent to the first purchases* would have required the entire restitutionary award to be made to the first purchaser unless a showing was made that a subsequent purchaser had a fixed quantity cost plus contract or its functional equivalent." (Mar. Pet. 24, n.21, emphasis added). The underscored passage is consistent with the refiners' position below, but cannot be reconciled with the theory of their petition—that they are entitled to a hearing on whether it is "impossible".

was filed prior to the District Court's judgment.[53] Rather, their petition makes a more general point, applicable to all the parties which join therein, that, because the District Court had granted them intervention as a matter or right under Rule 24(a), it violated that Rule by denying them the opportunity to present evidence of their injury. ATA Pet. i, first question; 18-21.[54] This contention is a *non sequitur*, for Rule 24(a) contains within it the requirement that the motion to intervene as of right be "timely".

Here, all the motions which sought intervention for the *purpose of appeal* were timely for that purpose and were granted. On the other hand, neither the motion of the Gasoline Retailers nor that of the Indicated Refiners, which were filed prior to judgment but after oral argument on DOE and Exxon's motions for summary judgment, were timely for the purpose of requiring the District Court to reopen its proceedings. The indisputable fact is that from the very outset of this case it has been clear that the United States was seeking restitution in the form of a payment into the United States Treasury. (*See* Complaint quoted at p. 5, n. 15, *supra*). The movants did not suggest in the District Court—nor do they

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[53] The Retailers' motion to intervene was originally denied by the District Court on the basis of its finding that the real victims of the overcharges were the ultimate *consumers* of petroleum products. (Exx. App. 249a, n.56). It is significant that the petition for certiorari in which they joined contains nothing to show that any retailer can demonstrate injury as a result of Exxon's overcharges.

[54] The parties to the ATA petition other than the Gasoline Retailers cannot maintain that contention for the additional reason that they moved to intervene only for the purposes of appeal. They are thus making the unsupportable assertion that the District Court erred by denying them that for which they did not ask. Likewise, since *none* of the petitioners opposed the granting of summary judgment, in accordance with the procedures of Rule 56 or otherwise, the argument in the ATA petition, pp. 21-23, that their rights under Rule 56 were infringed is also untenable.

demonstrate now—that they had a right to wait until the proceedings before the District Court were virtually complete before seeking to make a record on their claims.

The position urged in the ATA petition would lead to the absurd result that, where intervention is as of right, intervention may not be granted for purposes of appeal only. This Court has, however, approved intervention for purposes of appeal only, stressing that the propriety of such an appeal depends on "whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395-396 (1977). *Cf. NAACP* v. *New York*, 413 U.S. 345, 366 (1973). In *McDonald*, intervention had been allowed under Rule 24(b), *see id.* at 390, but the Court there cited with approval a series of court of appeals decisions which allowed intervention for purposes of appeal only under Rule 24(a). (*Id.* at 395-396, n.16).[55]

No distinction between Rules 24(a) and (b) for this purpose has been proffered in the ATA petition, or readily suggests itself. If petitioners' submission were correct, a party whose interest is sufficient to allow intervention as of right and is timely for purpose of appeal could not be granted such intervention without being allowed to reopen the case in the trial court, even if its intervention is untimely for that purpose. Any such result would either defeat the right to intervene for purposes of appeal only or undermine the timeliness requirement of Rule 24(a).

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[55] These cases are: *Hodgson* v. *United Mine Workers*, 153 U.S. App. D.C. 407, 419, 473 F.2d 118, 129 (1972); *Smuck* v. *Hobson*, 132 U.S. App. D.C. 372, 378-379, 408 F.2d 175, 181-182 (1969); *Pellegrino* v. *Nesbit*, 203 F.2d 463, 465-466 (9th Cir. 1953); *Wolpe* v. *Poretsky*, 70 U.S. App. D.C. 141, 144, 144 F.2d 505, 508, *cert. denied*, 323 U.S. 777 (1944). The reports of the other cited cases do not state whether Rule 24(a) or (b) intervention was involved.

In sum, the prejudgment movants' procedural objections are no more worthy of review than those of the other petitioners, who intervened for purposes of appeal only.

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be denied.

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December 23, 1985

(5) (4) (4) (3) (3)

Nos. 85-429, 85-430, 85-432, 85-440, and 85-444

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

OCTOBER TERM, 1985

EXXON CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

MARATHON PETROLEUM COMPANY, ET AL., PETITIONERS

v.

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AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL, PETITIONERS

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PHILADELPHIA ELECTRIC CORPORATION, PETITIONER

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NATIONAL FREIGHT, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether crude oil price control regulations in effect between 1973 and 1981 required petitioner Exxon Corporation to calculate the amount of "new oil" at its Hawkins Field Unit by reference to the additional oil actually produced in the unit as a whole rather than by reference to production that Exxon shifted from one lease to another within the unit (No. 85-429).

2. Whether the regulations impermissibly discriminated between units formed at different times (No. 85-429).

3. Whether Exxon's suggested effective date for calculating new oil on a unit-wide basis was unreasonable as a matter of law (No. 85-429).

4. Whether Exxon was properly held liable for all of the crude oil overcharges that it caused (No. 85-429).

5. Whether the district court abused its discretion in ordering the restitution of crude oil overcharges through the States (Nos. 85-430, 85-432, 85-440, and 85-444).

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In the Supreme Court of the United States

OCTOBER TERM, 1985

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] 1a-172a) is reported at 773 F.2d 1240. The opinion of the district court (Pet. App. 173a-268a) is reported at 561 F.Supp. 816.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1985, and petitions for rehearing were denied on August 15, 1985 (Pet. App. 269a-270a). The petitions for a writ of certiorari in Nos. 85-429 and 85-440 were filed on September 13, 1985. The petitions for a writ of certiorari in Nos. 85-430, 85-432, and 85-444 were filed on September 14, 1985. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 633.

STATEMENT

1. *Regulatory background. a.* In 1973, a predecessor agency to the Department of Energy (DOE)[2] promulgated Phase IV price controls for domestic crude oil pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note. See 6 C.F.R. Pt. 150, Subpt. L (1974), 38 Fed. Reg. 22536, 22538-22543 (1973); see also 10 C.F.R. Pt. 212, Subpt. D (1975), 39 Fed. Reg. 1924, 1952 (1974) (regulations as repromulgated under the

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[1] "Pet." and "Pet. App." refer to the petition and appendix in No. 85-429.

[2] Hereafter, we will use DOE to refer to its predecessor agencies as well as to the Department itself. The various agencies are set forth in *Pennzoil Co.* v. *DOE*, 680 F.2d 156, 161 & n.6 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983). See Pet. App. 8a n.4, 173a n.1.

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*). These controls instituted a two-tier pricing mechanism designed to dampen the inflationary spiral in crude oil prices without eliminating economic incentives for increasing domestic production. See Pet. App. 9a, 175a, 206a.

The "primary statutory mandate [was] to hold down prices of crude oil" by setting a ceiling for the price of domestic oil which was already being produced, referred to as "old oil." Pet. App. 197a. Old oil was defined as the monthly production from a property that did not exceed the property's "base production control level" (BPCL), which was its production for the same month in 1972. Production in excess of the property's BPCL was deemed "new oil" that could be sold at prices above the controlled price for old oil, thus avoiding any disincentive for producers to discover new sources of oil and to increase the amounts of oil recovered from properties already in production. See *id.* at 9a, 196a; 6 C.F.R. 150.354 (1974), 38 Fed. Reg. at 22538; 10 C.F.R. 212.72 (1975), 39 Fed. Reg. at 1952.

Central to the two-tier system was the definition of the "property" for which the BPCL and current production were calculated. See 41 Fed. Reg. 4931, 4938 (1976). The regulations defined property as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum." 10 C.F.R. 212.72 (1975), 39 Fed. Reg. at 1952 (repromulgating 6 C.F.R. 150.354 (1974)).[3] Left to their own devices, producers might seek to " 'obtain higher prices by arranging production in such a way as to shift oil into the "new" category to the maximum extent possible.' " Pet. App. 197a (citation omitted). Accordingly, the defini-

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[3] In 1976, Section 212.72 was "grammatically altered" (Pet. App. 177a n.5) "without substantive change" (*id.* at 9a) to define property as "the right to produce domestic crude oil, which arises from a lease or from a fee interest." 41 Fed. Reg. at 4920.

tion of property in Section 212.72 was intended to be interpreted in light of DOE's " 'duty to reasonably inhibit gerrymandering of boundaries undertaken to avoid price controls.' " *Ibid.* (citation omitted).

b. This case arises out of DOE's interpretation of its definition of property, and hence its determination of the proper amount of new oil produced, with respect to unitized crude oil producing properties formed after 1972, the base year for computing the BPCL. Unitization is a "cooperative production process" for "large, multilease tracts which * * * [formerly] operated as independent, competing properties." Pet. App. 177a. Under a "Unit Agreement," the "previously competing leaseholders * * * group their interests and form a single unit comprising all of the interests in the single reservoir of oil," which permits "enhanced recovery efforts [that] cause oil to flow underground across lease lines." *Id.* at 178a n.6. Following unitization, production from many wells is typically reduced or eliminated altogether while production from other wells within the unit is substantially increased. *Id.* at 15a, 178a n.6; 40 Fed. Reg. 40832 (1975).

DOE consistently interpreted the definition of property in Section 212.72 to require that the amount of new oil produced at units formed after 1972 be determined on a unit-wide basis, *i.e.*, by comparing the current monthly production from the unit with a BPCL consisting of the total amount produced during the same month in 1972 from all of the leases comprising the unit. See Pet. App. 10a; *Pennzoil Co.* v. *DOE*, 608 F.2d 156, 162-163 & n.11 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983).[4] The agency published this position in Ruling 1975-15, 40 Fed. Reg. 40832 (1975), where it stated that a unit's "BPCL is the total 1972 monthly production from

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[4] Certain of these interpretations, Nos. 1974-22, 1975-2, 1975-4, 1975-10, and 1975-27, were later published at 42 Fed. Reg. 23723, 23726, 23730, 23740, 25659 (1977). See Pet. App. 10a, 178a n.7.

all of the several leases that now comprise the unit." This approach was "dictated * * * by the need to compare like quantities, [during and after] 1972, in order to ensure a meaningful application of the new [oil]" provisions. *Ibid.* Otherwise, the "distorted actual production from any one lease comprising the unit" (*ibid.*; emphasis omitted) resulting from the shifts in production that normally accompany unit-wide production would allow producers to take advantage of the higher prices permitted for new oil far beyond the actual increase, if any, in their production of oil. As DOE explained, "the bulk of the actual production from the unit may be concentrated from only a few producing wells located on fewer than all of the several leases that comprise the unit, and lease-by-lease comparisons would yield no meaningful results in terms of measuring actual increases in production from those leases since the base period." 41 Fed. Reg. 4931, 4937 (1976). For these reasons, the agency concluded that "the unit agreement signifies one right to produce crude oil" and that "the unit [therefore] defines the property" under Section 212.72 of the regulations. 40 Fed. Reg. at 40832. See Pet. App. 10a, 177a-179a.

c. In December 1975, Congress enacted the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 *et seq.*, in light of changes in the condition of the nation's oil supplies. The statute permitted for the first time "price increases, without current increases in production, when the agency found that such price increases would give incentives for 'enhanced recovery techniques.' " Pet. App. 10; see *id.* at 179a-180a.[5] In response to the new statute and industry comments, in February 1976 DOE promulgated a new regulation effective prospectively from

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[5] Absent such circumstances, Congress specifically prohibited regulatory changes permitting "an increase in the price for any volume of old crude oil production." 15 U.S.C. 757(b)(2). See Pet. App. 179a-180a.

February 1, 1976, 10 C.F.R. 212.75 (1977), 41 Fed. Reg. at 4941. Section 212.75 provided that a "producer shall, as of the date of implementation of enhanced recovery operations on a unit or as of the date production patterns with respect to individual leases within a unit are substantially altered (whichever date occurs first), establish a unit base production control level for the unit." Before that time, meaningful lease-by-lease comparisons would still be possible, and delaying implementation of the unit-wide BPCL would remove certain "disincentive[s] to the *prospective* unitization of properties." 41 Fed. Reg. at 4938 (emphasis added); see also *id.* at 4936-4937. The regulation defined "enhanced recovery" as "any method * * * of recovering crude oil in which part of the energy employed to move the crude oil through the reservoir is applied from extraneous sources by the injection of liquids or gases into the reservoir." [6]

DOE also applied its more lenient approach toward unitized properties to existing units subject to Section 212.72 by rescinding ab initio "[t]hat limited portion of [Ruling 1975-15] which require[d] the producer *as of the effective date of unitization* to total all the BPCL's of participating leases and to treat the unit as a single property." 41 Fed. Reg. at 4937 (emphasis added). The agency reaffirmed the basic principle of Ruling 1975-15, embodied in 6 C.F.R. 212.72 (1975), that unitization normally requires unit-wide production comparisons in order to determine the true incremental increase in oil production; it concluded, however, that calculation of a unit-wide BPCL need not in every instance take place immediately upon unitization. 41 Fed. Reg. at 4937. Rather, DOE deter-

[6] The agency "ma[de] it clear" that its definition of enhanced recovery "would apply * * * so long as the '*energy employed* to move the crude oil through the reservoir is applied from extraneous sources.' The fact that the injected fluids or gases may have originated in the reservoir is irrelevant as long as they are injected by an extraneous energy source." 41 Fed. Reg. at 4938 (emphasis in original).

mined that a unit-wide BPCL need be implemented only after "there has been a significant alteration in pre-unitized producing patterns of the individual leases" or "enhanced recovery operations [have begun]." *Ibid.*; see generally Pet. App. 11a-12a, 180a-181a. The agency stated that at a later time it would further clarify the standard of a significant alteration in production patterns beyond its extensive reference in the preamble to the necessity for adopting a unit-wide BPCL where a meaningful comparison of pre- and post-base level production would not be possible on a lease-by-lease basis. 41 Fed. Reg. at 4937; see also 41 Fed. Reg. 36172, 36181 (1976). See generally Pet. App. 10a-12a, 180a-182a.

d. After receiving comments on the issue, DOE amended Section 212.75 in August 1976 to define "significant alteration in producing patterns" as "the occurrence of either (1) the application of extraneous energy sources by the injection of liquids or gases into the reservoir, or (2) the increase of production allowables [*i.e.*, maximum permitted production levels] for any property that constitutes the unitized property." 41 Fed. Reg. 36172, 36184. Once either of these events occurred, the BPCL was required to be calculated on a unit-wide basis. *Ibid.* At the same time, the agency further amended Section 212.75 "to eliminate any remaining disincentive to producers of new crude oil to enter unitized properties" by granting them the benefit of "imputed new oil," which ensured that newly formed units would be permitted to sell at least as much new oil as they had produced before unitization. 41 Fed. Reg. at 36182; see *id.* at 36184. See generally Pet. App. 12a, 182a.

e. In response to further comments, the agency clarified its amended Section 212.75 in Ruling 1977-2, issued in January 1977. 42 Fed. Reg. 4409. This ruling made clear that "Section 212.75, adopted on February 1, 1976, is applicable only to enhanced recovery unitized properties which established a unit BPCL on or after February 1,

1976." *Id.* at 4415. Units formed prior to that date, by contrast, were governed by Section 212.72, as reflected in Ruling 1975-15 (as modified on February 1, 1976). *Ibid.* The later definition of "significant alteration in producing patterns" promulgated in August 1976 would "be considered as guidance" with respect to determining the date on which a unit BPCL would be required for these earlier-formed units. *Ibid.* Producers would be permitted to attempt "to justify the establishment of the date of significant alteration in producing patterns" on other reasonable grounds "on a case-by-case basis." *Ibid.* DOE also explained that the special incentive of "imputed new oil" provided in the amendment to Section 212.75 effective September 1, 1976, was available only for units undergoing a significant alteration on or after that date. 42 Fed. Reg. at 4414. See Pet. App. 12a, 182a-183a.

2. *Factual background.* a. Oil was discovered in the Hawkins Field in Texas in 1940. Within a decade, more than 200 companies and individuals were producing oil on more than 300 leases in the field; by 1969, petitioner Exxon Corporation[7] owned two-thirds of the field's production. The Texas Railroad Commission regulated the competitive production of oil from Hawkins Field by setting "production allowables" limiting the amount of oil that could be produced from each well. The Commission also established a "maximum efficient rate of production" (MER), which limited the volume of oil that could be pumped from the field as a whole each day. Under the Commission's MER rules, any shortfall in a lease's daily production under its allowable was distributed pro rata to all of the other capable leases in the field in order to allow total production to remain at the MER level. Pet. App. 14a-15a, 183-184a.

Several years before the promulgation of crude oil price

[7] Unless otherwise stated, we will use "petitioner" to refer to Exxon Corporation.

control regulations, petitioner and other owners of interests in Hawkins Field recognized the need to initiate enhanced recovery operations in order to arrest the decline in natural reservoir pressure that had occurred over the years and thereby to prolong the life of the field. In 1969, petitioner began to promote unitization of the field, which would spread the cost of recovery operations and permit the use of techniques that would move oil across lease lines. In preparation for unitization, the Commission authorized petitioner in 1969 to conduct a limited interim gas injection project and significantly increased the field's daily MER allowable. Pet. App. 15a-16a, 184a-185a.

During the extensive negotiations leading to a unit agreement, petitioner projected a net after-tax profit for the interest owners resulting from unitization of more than $250 million. This figure was based on an oil price substantially below the price at which *old* oil eventually sold under price controls. The unit agreement, ultimately signed in 1974, provided that petitioner would operate the unit beginning on January 1, 1975. Pet. App. 16a, 185a; R. 23881-23882, 24057, 24128-24130.

b. Following the promulgation of price controls in 1973, petitioner issued instructions to its employees requiring that each of its multi-lease units, including those (like Hawkins Field) formed after 1972, must be treated as a single property for price regulation purposes, and petitioner in fact followed those instructions at other post-1972 units. Pet. App. 16a-17a, 186a-187a. In July 1974 petitioner informed other Hawkins Field interest owners that, "[a]fter unitization, the field is treated as a single lease and exempt [*i.e.*, new] oil is calculated on a total field basis." R. 24366. As petitioner explained, this would result in "much less exempted oil volume than under nonunit operation." R. 24375; see also R. 24379, 24385. Notwithstanding the smaller amount of new oil that would be available under the unit price rule, 98.5% of

the working interest owners in Hawkins Field and 82% of its royalty interest owners had signed the unit agreement as of early August 1974. R. 24411; see also R. 18013-18014.

c. Shortly before unitization became effective, however, petitioner decided to depart from its prior representations to the Hawkins Field interest owners and from its pricing practices at other unitized fields by announcing that it would continue lease-by-lease accounting at Hawkins Field following unitization. Pet. App. 17a, 187a-188a. Once unitization began, petitioner was permitted by the state regulatory agency "to transfer production among wells within the unit, *at will.*" *Id.* at 16a (emphasis in original). Petitioner immediately took advantage of this new flexibility by shutting in more than 20% of the unit's wells, which enabled it to reduce production at 137 leases by nearly 320,000 barrels and to increase production by an equal amount at 65 other leases. *Id.* at 46a. Petitioner also substantially increased the volume of gas that it injected into the field. *Id.* at 49a-50a, 230a-231a.

In light of petitioner's continued lease-by-lease accounting following unitization, its transfer of production among leases "resulted in substantial increases in 'new' oil, without any actual increase in total production from the field." Pet. App. 46a. Petitioner "doggedly persisted, even in the face of the pellucid dictates of Ruling 1975-15, in applying individual lease accounting at the Hawkins Field." *Id.* at 234a (footnote omitted). It did not adopt a unit-wide BPCL until September 1, 1976. When it did so, petitioner performed its calculations under the more generous provisions of Section 212.75 of the regulations rather than under Section 212.72, even though the agency consistently had determined—and made explicit in January 1977—that Section 212.75 did not apply to units such as Hawkins Field that were formed prior to February 1976. Pet. App. 18a, 190a. Petitioner continued accounting on this basis until decontrol in 1981. Despite a "steady

decline in production" at Hawkins Field during the period that controls were in effect, petitioner's pricing practices ensured that "an *increasing* percentage of oil was accounted for by [petitioner] as upper-tier, higher-priced oil, until beginning June 1, 1979, almost all of the [production] was classified as new oil." *Id.* at 190a (emphasis added).

3. *Proceedings below.* a. The United States filed this action in the United States District Court for the District of Columbia, seeking restitution from petitioner of the overcharges that it caused by improperly computing the amount of new oil produced at Hawkins Field.[8] On cross-motions for summary judgment, the district court denied petitioner's motion and granted the government's motion to require restitution of all overcharges with interest. Pet. App. 173a-268a. The district court held that Section 212.72 of the regulations required the adoption of a unit-wide BPCL immediately upon unitization and that petitioner suffered no prejudice from application of the less stringent "significant alteration" test as "guidance" for determining the date at which calculation of such a BPCL was required. *Id.* at 206a-210a, 213a-214a. The district court rejected petitioner's contention that the government was estopped from enforcing its regulations, noting that "a regulated party as sophisticated as [petitioner]" could not reasonably "ignore[ ] the only existing official pronouncements" in favor of "unauthorized views of agency employees ferretted out by [petitioner] which happen to coincide with [its] self-interest." *Id.* at 234a.

The district court also determined that DOE's "sliding scale of incentives, though complex, reasonably carried

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[8] The government also sought civil penalties. The district court declined to assess a penalty, noting that while petitioner "ignor[ed] the unequivocal dictates" of the regulations, it "accurately represented its conduct to the agency." Pet. App. 260a. The government did not prosecute an appeal from this ruling. *Id.* at 5a.

out the conflicting objectives" of holding down prices while increasing production. Pet. App. 220a n.37. Accordingly, the agency did not act improperly in offering special benefits, such as imputed new oil, to producers that, unlike petitioner, had not found unitization economically attractive without those benefits. *Id.* at 214a-221a. "In refusing to go further and to extend greater benefits to pre-existing units" such as Hawkins Field, the district court reasoned, "the agency performed precisely the delicate weighing of competing statutory objectives with which Congress had entrusted it and to which judicial deference is due." *Id.* at 220a. The district court also noted the "puzzling" nature of petitioner's attacks on Section 212.75, since even if that regulation were invalidated, Section 212.72, which set forth the definition of "property," nonetheless required implementation of a unit BPCL at Hawkins Field as of January 1, 1975. Pet. App. 227a n.39.

Giving petitioner the benefit of the relaxed requirement of Ruling 1977-2, and applying as guidance the definition in Section 212.75, the district court ruled that a unit BPCL was required under that definition as well on January 1, 1975, because a "significant alteration in producing patterns" occurred as of that date. Pet. App. 221a-231a. The district court reached this result in view of the increased injections of gas, increases in production allowables, and substantial transfer of production among leases that occurred simultaneously with unitization. The district court also concluded that, as a matter of law, petitioner had not offered any basis for the choice of a reasonable alternative date on which to begin unit-wide accounting. *Id.* at 226a-227a n.38.[9] Petitioner's reliance on the testimony of

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[9] The district court addressed this issue even though petitioner had not actually contended that its evidence established a reasonable alternative date within the definition set forth in the regulations and the question therefore was "not before the court." Pet. App. 226a n.38; see also *id.* at 52a-53a & n.26.

petroleum engineers with respect to the underground drive mechanism of the Hawkins Field reservoir would be unworkable, the district court found, because it would substitute "hard to decipher underground phenomena" for the "clear, easily administered test" adopted by DOE. *Id.* at 222a.

Finally, the district court held petitioner liable for the full amount of the overcharges from Hawkins Field because petitioner had caused those violations of the law by its pricing and production decisions as operator of the unit. Pet. App. 239a-259a. In light of the impossibility of identifying the ultimate victims of petitioner's actions, the district court exercised its equitable powers to order the funds to be deposited in an escrow account for distribution to the states in connection with specified energy conservation programs. *Id.* at 255a-256a.[10]

b. The court of appeals affirmed. Pet. App. 1a-172a.[11] Relying on its decision in *Pennzoil Co.* v. *DOE, supra,* the court of appeals held that Section 212.72 "required the establishment of a single BPCL upon unitization of the Hawkins Field." Pet. App. 29a. It further noted that Ruling 1975-15, which made this interpretation explicit, was later only partially rescinded and that the agency's focus remained on "the fact that lease-by-lease accounting was not permissible after some alteration in production methods precluded any 'meaningful comparison' of current and base period production." *Id.* at 30a.

The court of appeals agreed with the district court that, even under the relaxed application of Section 212.72 and

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[10] In view of the fact that the judgment was only a small fraction of petitioner's net worth, the district court relieved petitioner of the requirement that it post a bond pending appeal. See R. 31664.

[11] The panel was unanimous with respect to petitioner's liability. Judge Becker dissented in part solely on the ground that persons claiming to be actual victims of petitioner's overcharges should have been afforded an opportunity to prove the fact and amount of their damages. Pet. App. 93a-172a.

the significant alteration test, petitioner was required to adopt a unit BPCL for Hawkins Field as of January 1, 1975. *Id.* at 30a-39a, 43a-51a. The court of appeals rejected petitioner's contention that Hawkins Field never would have been unitized had the owners known that a unit BPCL was required, noting that petitioner "was well aware that Section 212.72 required adoption of unit-wide accounting upon unitization." *Id.* at 40a.[12] The court of appeals also concluded that the special benefits for prospective unitization provided in Section 212.75 were not arbitrary. *Id.* at 41a-43a.

The court of appeals rejected petitioner's argument that it had established a reasonable alternative basis for unit-wide accounting for two reasons. First, "any meaningful comparison of production levels between 'old' and 'new' oil on a lease-by-lease basis became impossible once production across lease lines began in January, 1975." Pet. App. 53a. Second, "any resort to the testimony of expert petroleum engineers * * * would be unworkable, and therefore, not a reasonable basis for determination of the question." *Id.* at 54a-55a.

Relying on its decision in *Sauder* v. *DOE*, 648 F.2d 1341 (Temp. Emer. Ct. App. 1981), the court of appeals agreed with the district court that petitioner was liable for all of the overcharges from the unit because "[t]he undisputed evidence" (Pet. App. 57a) demonstrated that petitioner caused those overcharges. *Id.* at 55a-61a. The court of appeals also held that the district court had properly exercised its equitable discretion in requiring petitioner to pay the full amount of the overcharges in view of petitioner's failure to follow the clear commands of the regulations. *Id.* at 76a-77a. Finally, the court of appeals upheld the

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[12] Unitization was attractive even under the unit BPCL requirement because it made possible the production of more oil for the unit as a whole than if the owners had continued competitive production and lease-by-lease accounting. See Pet. App. 40a; see also Pet. 2.

district court's order concerning disposition of the judgment. *Id.* at 78a-92a; see note 11, *supra*.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The Temporary Emergency Court of Appeals decided a narrow issue of regulatory construction under a program of emergency price controls that has long since expired and is of no continuing importance. As this Court has noted, Congress established TECA in order to ensure expert and uniform treatment of energy issues, and it is "a court intimately familiar with the intricacies of federal energy regulation." *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982). TECA carefully considered the arguments presented in the petitions, and it rejected them in a thoughtful decision.[13] In these circumstances, further

[13] Petitioner Exxon's renewal (Pet. 27 n.24) of its prior attack (84-1142 Pet. 9-11) on the integrity and impartiality of the judges designated by the Chief Justice to serve on TECA is unwarranted and disrespectful of the judges who devote their time and energy to serving on that court. Petitioner's specious and impertinent claim that TECA's supposed partiality is "widely recognized" is not corroborated by the references on which it relies. Moreover, petitioner fails to support the implication of its allusion to the government's success in cases before TECA—*i.e.*, that those cases were wrongly decided. Rather, the outcome of cases in TECA reflects the insubstantial nature of many of the arguments raised in opposition to DOE positions, something further illustrated by Exxon's petition in this case. We note that our own informal survey indicates that the other courts of appeals have decided approximately 90% of appeals relating to the Emergency Petroleum Allocation Act on the merits in favor of the government. Finally, petitioner's characterization of TECA's treatment of the applicability of *INS* v. *Chadha*, 462 U.S. 919 (1983), to the price control program as "cavalier[]" (Pet. 39 n.33) is disingenuous at best. As petitioner well knows, that issue had already been conclusively decided against it by TECA in the court of appeals' comprehensive opinion in *Exxon Corp.* v. *DOE*, 744 F.2d 98 (1984), cert. denied, No. 84-188 (Dec. 3, 1984), and it therefore warranted little discussion here.

review is not warranted.[14]

1. Petitioner argues first (Pet. 27-29, 29-32)[15] that the regulations did not require it to adopt a unit-wide BPCL for Hawkins Field as of January 1, 1975. This argument is completely without merit.

a. The definition of property contained in Section 212.72 was promulgated by the agency in 1973. TECA has consistently held that that regulation, in itself, required the adoption of a unit BPCL immediately upon unitization. See *Pennzoil Co.* v. *DOE*, 680 F.2d 156, 168 (1982), cert. dismissed, 459 U.S. 1190 (1983); *Francis Oil & Gas, Inc.* v. *Exxon Corp.*, 687 F.2d 484, 488, cert. denied, 459 U.S. 1010 (1982); *DOE* v. *Louisiana*, 690 F.2d 180, 190 (1982), cert. denied, 460 U.S. 1069 (1983); *Grigsby* v. *DOE*, 585 F.2d 1069 (1978), cert. denied, 440 U.S. 908 (1979). As TECA explained in *Pennzoil* (680 F.2d at 168):

> "The focus of the 'property' definition is upon the 'right to produce,' not the fee or leasehold nature of the ownership interest." [Citation omitted.]

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[14] Contrary to its repeated suggestions (Pet. i, 1, 2, 25, 42), the mere monetary size of petitioner's violations does not entitle it to further review in the absence of a legal issue of sufficient general significance to warrant this Court's attention. We note also that the constitutional garb in which petitioner dresses what are at bottom mundane challenges to an agency's exercise of discretion and interpretation of its own regulations was donned fairly late in the day. In almost 200 pages of briefs in the court of appeals, petitioner mentioned due process only twice. Cf. Pet. 2, 25, 26, 29, 31 n.29, 32, 42. Not until its petition for rehearing did petitioner expressly make its primary argument in constitutional terms, and then only very briefly (at 25-26). Thus petitioner "continues to shift ground" in this Court just as it did below. Pet. App. 53a n.28; see *id.* at 32a. See generally, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

[15] Petitioner Exxon attacks only the finding of liability (questions 1-4). The petitioners in Nos. 85-430, 85-432, 85-440, and 85-444 support the finding of liability and seek review only of the question whether the district court abused its discretion in ordering that the judgment fund be distributed through the several States (question 5). These issues are completely independent.

> The application of this definition to unitized properties plainly contemplates a single "property" or right to produce arising from the several leases or fee interests constituting the unit.
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> * * * * *
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> [I]f upon unitization the "property" is no longer defined by each individual lease but by the unit as a single right to produce, it seems rather obvious that current production of the "property" after unitization must include all production from all of the leases within the unit.

Thus, even if DOE had done nothing further, Section 212.72 alone—which is how the regulations stood at the time that petitioner formed the unit and made its pricing decisions—required petitioner to adopt a unit BPCL for Hawkins Field on January 1, 1975. Pet. App. 38a.

Petitioner makes three responses.[16] First, it contends that the language of Section 212.72 required lease-by-lease accounting at unitized properties. Pet. 6, 27-28. This argument misreads the "plain language of the definition" and would in effect completely rewrite it. *Pennzoil*, 680 F.2d at 169; see *id.* at 168; Pet. App. 27a-29a. Moreover, it rests, like much of petitioner's argument (*e.g.*, Pet. 2, 9, 41), on an unreasonable and one-sided view that the overriding purpose of the price control regulations was to encourage production. As the courts below made clear, that goal was

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[16] All of these responses miss the point that petitioner's liability rested on its failure to satisfy the more lenient "significant alteration in production" standard of Ruling 1977-2 rather than the immediate unit-wide BPCL requirement of Ruling 1975-15. See Pet. App. 38a, 43a-51a. That petitioner was unable to qualify for the benefits provided by the more lenient standard is no reason to invalidate the agency's construction of its own regulations, which plainly were not intended to provide benefits to all units regardless of circumstances. Cf. *Placid Oil Co.* v. *FPC*, 483 F.2d 880, 905 (5th Cir. 1973), aff'd *sub. nom. Mobil Oil Co.* v. *FPC*, 417 U.S. 283 (1974).

only one of several and scarcely could be given controlling weight in disregard of the fundamental purpose of directly limiting the price increases that were plaguing the nation. See Pet. App. 9a, 175a, 197a, 206a.[17] Petitioner's reading of the regulation would utterly have failed to advance this purpose in a sensible fashion, for it would have allowed the creation on paper of new, higher-priced oil simply by shuffling production from one well to another without any actual increase in production. See pages 3-5, 10-11, *supra.* Indeed, it would have permitted crude oil producers to escape price controls altogether merely by joining forces with their neighbors and pumping all of their joint production out of one well rather than two. Finally, petitioner fails to give due deference to DOE's own interpretation, adopted in several contemporaneous rulings, that Section 212.72 required a unit BPCL immediately upon unitization, an interpretation faithful to the language of the regulation and to the underlying statutory and regulatory purposes. See, *e.g.*, Pet. App. 196a-197a; *Udall* v. *Tallman,* 380 U.S. 1, 16-17 (1965) (citation omitted) (" '[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' ").[18]

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[17] One searches in vain through the 42-page petition for even an acknowledgement that one purpose of price controls was to control prices.

[18] The fact that several of the interpretations (unlike Ruling 1975-15) were not published in the Federal Register until 1977 (see note 4, *supra*) does not detract from their probative value in demonstrating the agency's view of what its own regulations required. Of course petitioner could not have been bound by unpublished rulings; the point, however, is that the validly promulgated and published regulation itself required the practice that petitioner refused to adopt. In view of both Ruling 1975-15 and the agency's other contemporaneous interpretations of Section 212.72 to require a unit BPCL immediately upon unitization, petitioner's characterization of this understanding of the regulation as a "later *post hoc* rationalization[] of the agency's litigation attorneys" (Pet. 28 n.26) is contrary to fact.

Second, petitioner appears to suggest (Pet. 28 n.27, 41), although it avoids directly invoking the doctrine, that the government should, in effect, be estopped from enforcing Section 212.72 on the basis of alleged informal oral advice by some agency employees that lease-by-lease accounting of unitized properties was permissible, an argument that petitioner waived in the court of appeals. See Pet. App. 77a-78a n.41. Consistently with this Court's rulings, TECA has repeatedly held, as it did here, that the views of individual officials could not reasonably be relied on as those of the agency and cannot estop the government from enforcing the law. See Pet. App. 33a-34a; *Christmann & Welborn* v. *DOE*, 773 F.2d 317 (1985), cert. denied, No. 85-81 (Oct. 15, 1985); *Pennzoil Co.* v. *DOE*, 680 F.2d at 171-172. See generally, *e.g.*, *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981). In any event, it is quite plain that petitioner did not rely on such advice in embarking upon unitization at Hawkins Field, for petitioner obtained the agreement of the other interest owners on the assumption that unit-wide accounting would be required, and it followed that practice at its other units as well. See pages 9-10, *supra*.[19]

Third, petitioner argues that DOE's partial rescission of Ruling 1975-15 in February 1976 vitiates all reliance on the agency's interpretation of Section 212.72 to require unit-

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[19] Without pausing to acknowledge the findings of the courts below, petitioner baldly asserts that Hawkins Field never would have been unitized had the interest owners known that a unit BPCL was required. Pet. 5-6, 31. The court of appeals expressly rejected this speculation (Pet. App. 40a), and it defies common sense as well as the factual record. Petitioner and the other Hawkins Field interest owners were quite obviously far better off financially once the reservoir was unitized even with the unit BPCL required by Section 212.72 because unitization allowed the production of substantially greater quantities of oil than would otherwise have been possible. See Pet. App. 15a, 40a-41a, 208a-209a n.30.

wide BPCLs. Pet. 27-29. In making this argument, petitioner completely misconstrues DOE's February 1976 ruling. The agency reaffirmed the principle of Section 212.72 and Ruling 1975-15 that unitization normally requires the adoption of a unit BPCL because lease-by-lease comparisons of production are no longer meaningful. 41 Fed. Reg. 4931, 4937 (1976). However, because it recognized that production patterns are not in every case realigned simultaneously with unitization, the agency relaxed the requirement that producers adopt a unit BPCL immediately upon unitization in favor of the "significant alteration in producing patterns" standard, which both was more sensitive to the changes that necessitated adoption of a unit BPCL and increased the incentives for unitization. See Pet. App. 30a-31. The result was a less stringent application of Section 212.72. But the agency most emphatically did not establish the propriety of the lease-by-lease accounting practices followed by petitioner, which resulted in increasing amounts of new oil being reported even as actual production declined. *Id.* at 190a.[20]

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[20] The agency made this clear at the time (41 Fed. Reg. at 4937):

> [I]n determining quantities of new * * * crude oil from a unit under the prior regulations, Ruling 1975-15 required that current total production from the unit exceed the total base production control levels for all the participating properties of the unit before any of the unit production qualifies as new crude oil.
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> This result is dictated by the need to compare current production levels with like quantities of base production control levels in determining whether there has been an increase in production above base period levels. * * * [A] meaningful comparison could not ordinarily be obtained where current production figures from individual leases are compared with BPCL's from those leases, once there has been a realignment of producing patterns such as normally accompanies enhanced recovery. Thereafter, the bulk of the actual production from the unit may be concentrated from only a few producing wells located on fewer than all of the several leases that comprise the unit, and lease-by-lease comparisons would yield no meaningful results in terms of measuring actual

b. Petitioner argues as well (Pet. 29-31) that the new standard for determining the date for calculating new oil on a unit-wide basis embodied in the definition used in Section 212.75 could not be applied retroactively to Hawkins Field.[21] As both courts below noted, the argument is a curious one because invalidation of Section 212.75 would leave petitioner in no better position: it would still have been required to adopt a unit BPCL on January 1, 1975 under Section 212.72, as just discussed. Pet. App. 32a, 227a-228a n.39. In any event, retroactive application of the definition used in Section 212.75 is unobjectionable because it did not prejudice petitioner. Cf. *United States* v. *Caceres*, 440 U.S. 741, 752-753 & n.15 (1979); *American Farm Lines* v. *Black Ball Freight Serv-*

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increases in production.

> * * * [U]ntil such time as there has been a significant change in producing patterns, [however,] there is no reason for the unit operator to depart from the historical practice of determining quantities of new crude oil on a lease-by-lease basis.
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> * * * Once enhanced recovery operations begin [or producing patterns are significantly altered before the actual implementation of enhanced recovery operations], the producer will be required to calculate a unitized BPCL * * *.

[21] Petitioner appears at times to suggest that even under the definition set forth in Section 212.75 or some ill-defined "generic standard," a significant change in producing patterns did not take place on January 1, 1975. See, *e.g.*, Pet. 23 n.21, 32 n.29. However, the record clearly establishes the extent to which petitioner shifted production among leases as of that date, thereby rendering meaningful lease-by-lease comparisons—the only possible "generic" touchstone—impossible. See page 10, *supra*. Moreover, it is undisputed that production allowables and gas injections increased, thereby triggering a unit BPCL requirement under the regulatory definition (contrary to petitioner's contention, the regulations did not require that the injected gas be obtained from sources outside the reservoir, see note 6, *supra*). It would, indeed, have been flatly inconsistent with the statutory purpose for the agency to have permitted the wholly illusory creation of higher-priced new oil for which petitioner argues. See Pet. App. 43a-51a (finding as a matter of law that a significant alteration of producing patterns occurred at Hawkins Field on January 1, 1975).

ice, 397 U.S. 532, 539 (1970); see generally *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). Ruling 1977-2, using the definition in the new Section 212.75, was more favorable to producers than Ruling 1975-15, which strictly applied the old Section 212.72. Moreover, in making its decision to unitize, petitioner relied only on the less favorable prior standard requiring the immediate adoption of a unit BPCL. Pet. App. 38a-41a; see pages 9-10, *supra.*

2. Petitioner argues next (Pet. 32-35) that the additional incentives for unitization provided by the regulations for units formed after February 1976 were irrational. The courts below thoroughly discussed and correctly rejected this contention. Pet. App. 41a-43a, 214a-221a. As the district court noted, petitioner merely "seeks to wage the battle it lost when Section 212.75 was promulgated." *Id.* at 220a. DOE "performed precisely the delicate weighing of competing statutory objectives with which Congress had entrusted it and to which judicial deference is due." *Ibid.* The differing incentives available to units that were formed at different times or not yet formed reasonably balanced the conflicting goals of increasing production and holding down prices by offering additional benefits only to those producers for whom unitization would not otherwise have been profitable. See *DOE* v. *Louisiana,* 690 F.2d at 189. The purpose of Section 212.75 was "to remove any * * * regulatory impediments to the *formation* of units." 41 Fed. Reg. 36172, 36182 (1976). Since it was unnecessary to encourage something already accomplished, it was completely reasonable not to apply the incentive provisions of Section 212.75 to pre-existing units such as Hawkins Field. TECA, which has special expertise in this area, found no basis for setting aside the agency's exercise of discretion. There is no basis (or need, given the fact that the regulations have expired) for this Court to do so either. See generally, *e.g., Capital Cities Cable, Inc.* v. *Crisp,* No. 82-1795 (June 18, 1984), slip op. 15; *Heckler* v.

Campbell, 461 U.S. 458, 466 (1983); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).[22]

3. Petitioner argues next (Pet. 35-38) that it was denied an opportunity to present a reasonable alternative basis for beginning unit-wide accounting at Hawkins Field. Apparently, petitioner relies on the testimony of "fourteen petroleum engineering experts" concerning the underground drive mechanism of the reservoir and concluding that the most significant change occurred with the injection of inert gas beginning in 1977. See Pet. 17 n.15. Petitioner's argument misses the point. Both courts below fully credited petitioner's evidence. They properly concluded, however, that there was no factual dispute to be decided because petitioner's proferred alternative date was unreasonable as a matter of law. Pet. App. 52a-55a, 226a-227a n.38. Accordingly, no factual hearing was required. See, *e.g.*, *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620 (1973).[23]

The unreasonableness of petitioner's suggested date is apparent at once. Petitioner extensively realigned production patterns at Hawkins Field beginning on January 1, 1975. See page 10, *supra*; Pet. App. 46a, 228a-229a. As the district court explained, petitioner's "own measurements and analysis of production shifts at Hawkins Field show[ed] the dramatic changes that occurred in 1975," in-

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[22] In any event, as the courts below noted, petitioner's attack, if successful, would result only in the invalidation of certain of the benefits provided by Section 212.75, not the extension of those benefits to petitioner. Pet. App. 43a n.17, 219a n.35.

[23] Petitioner's grandiose invocation (Pet. 35-36) of the *Accardi* doctrine, *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), is irrelevant. Nothing in the agency's regulations provided that a completely meaningless factual hearing must be held where the producer's suggested alternative date fails as a matter of law. See also Fed. R. Civ. P. 56 (providing for summary judgment where there is no issue of material fact).

cluding a shift of "almost 20 percent of 1975 production * * * across lease lines, almost two and one-half times as much as had shifted in either 1974 or 1973." *Id.* at 229a-230a n.42. It was this substantial shift in production that allowed petitioner to claim most of its new oil even though total production from the field had not in fact increased, a result prohibited by the letter, and antithetical to the purposes, of the price control program. The agency had in fact repeatedly made crystal-clear that shifts such as those caused by petitioner at Hawkins Field rendered meaningful lease-by-lease comparisons impossible and therefore required the adoption of a unit BPCL. See, *e.g.*, *id.* at 53a; note 20, *supra.*

In short, petitioner's " 'realignment of the pattern of production would have played havoc with the federal pricing system had [the agency] permitted lease by lease property designations to continue in force after a unitization [because] [i]t would have resulted in the recognition of artificially high quantities of new oil from some of the participating leases while other leases would be producing less or not at all.' " Pet. App. 54a (citation omitted). The underground drive mechanism of the reservoir is thus irrelevant and, in any event, too complex and amorphous to be relied upon as a workable regulatory standard. *Id.* at 54a-55a, 226a n.38.

4. Petitioner lastly takes issue (Pet. 38-41) with the amount of the judgment. Petitioner's reliance on the supposed equities in its favor is, as the court of appeals observed, for the most part "simply a recasting of its unsuccessful claim * * * that the Government was estopped from challenging the legality of lease-by-lease accounting." Pet. App. 77a. Contrary to petitioner's argument, the courts below fully considered the relevant mitigating factors; indeed, the district court, after "careful consideration of the voluminous record," declined to assess civil penalties against petitioner. *Id.* at 259a-260a.

By the same token, however, the district court refused "to excuse [petitioner's] behavior." *Id.* at 260a. As the district court noted, petitioner's pricing practices "ignor[ed] [the] unequivocal dictates of the regulations" and departed from petitioner's own construction and application of the regulations at its other units. *Ibid.* The court of appeals adopted the findings of the district court in this regard, *id.* at 77a, and they plainly warrant no further review.[24]

Petitioner's argument that its liability should have been limited to its own production from Hawkins Field was correctly rejected by TECA (Pet. App. 55a-61a) on the basis of that court's prior precedents. Moreover, this Court has recently declined to review the identical contention in *Christmann & Welborn* v. *DOE,* 773 F.2d 317 (Temp. Emer. Ct. App. 1985), cert. denied, No. 85-81 (Oct. 15, 1985); see also *Sauder* v. *DOE,* 648 F.2d 1341, 1347-1349 (Temp. Emer. Ct. App. 1981). There is no reason for a different result here.

Petitioner, which owned approximately 80% of the working interest in Hawkins Field, was the moving force behind unitization and the dominant force after unitization. Its liability rests on the fact that petitioner "caused the overcharges" throughout the unit and is therefore "fully liable for all of them." Pet. App. 55a. As sole operator of the unit, petitioner made all production and pricing decisions (*id.* at 57a (quoting district court's opinion)):

"[Petitioner] chose the wells to shut-in, the wells

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[24] Petitioner's challenge to the award of prejudgment interest rests on the same " 'considerations of fairness' " that it urges in mitigation of the award generally. Pet. 40-41 (quoting *Board of County Commissioners* v. *United States,* 308 U.S. 343, 352 (1939)). The argument was properly rejected by both courts below. Pet. App. 71a-76a, 258a-259a. Similarly, petitioner's suggestion that consumers were not injured by its overcharges (Pet. 39) ignores the fact that, "because of the nature of the Entitlements Program, and the price control regulations, the effect of [petitioner's] wrong had been spread throughout the distribution chain, to the ultimate consumers." Pet. App. 78a; see pages 28-29, *infra.*

> where production was to go up or down, where to inject gas, and how much. . . . Most important, [petitioner] decided how the unit would account for upper and lower tier oil, first in 1974, before the field was legally unitized . . . later after Ruling 1975-15 was issued, . . . and finally when it switched to a unit BPCL under Section 212.75 in September 1976."

Thus, "[t]he undisputed evidence * * * supports the conclusion that [petitioner] is responsible for all of the overcharges." *Ibid.*[25]

TECA correctly concluded that operator liability is in accordance with the scheme established by Congress and is necessary to avoid a multiplicity of actions across the country against the almost 2500 owners of interests in Hawkins Field, which would " 'plunge the agency into an "administrative quagmire" * * * [and] effectively block enforcement of oil price controls at Hawkins Field.' " Pet. App. 57a (citations omitted). This conclusion by TECA, the court most familiar with the regulatory program at issue in this case, see *Tully* v. *Mobil Oil Corp.*, 455 U.S. at

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[25] Petitioner's argument (Pet. 39) that it cannot be held liable for overcharges attributable to Texaco's production from Hawkins Field was correctly rejected by TECA because the "uncontested facts established that [petitioner] did 'cause' th[ose] overcharges" as well as all of the others at the Hawkins Field Unit. Pet. App. 62a. Petitioner also renews in this Court (Pet. 23-24 n.22) a contention that TECA correctly ruled had not been properly preserved for appellate review (Pet. App. 66a-67a) concerning whether a small amount of the judgment had inadvertently been based on production from outside Hawkins Field. This claim apparently relates to production by a few owners whose tracts were in fact within the unit but who had not signed the unit agreement, production that in our view is properly encompassed within the judgment. In reviewing the record, we have not ascertained that any sales from tracts not within the Hawkins Field Unit were included in the judgment. In any event, petitioner's argument would have been more appropriately addressed to the lower courts through a motion to alter or amend the judgement had petitioner not already waived it.

248, is consistent with decisions of other courts of appeals in analogous contexts and warrants no further review. See *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir.), cert. denied, 404 U.S. 1005 (1971); *Tenneco Oil Co.* v. *FPC*, 442 F.2d 489 (5th Cir. 1971).

5. Finally, the petitioners in Nos. 85-430, 85-432, 85-440, and 85-444[26] argue that the district court abused its discretion in ordering that restitution of Exxon's overcharges be made through the several States rather than allowing consumers and direct and indirect purchasers of crude oil to attempt to prove that they suffered actual and quantifiable losses as a result of Exxon's violations. These petitioners intervened only very late in the day in the district court and offered little support there for the contentions that they now press.[27] Although for the most part they do not now detail the basis on which they are entitled to the overcharges, the remedy petitioners—which include refiners, distributors, and ultimate consumers of crude oil—offered in the court of appeals competing and

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[26] We refer to these parties as the "remedy petitioners."

[27] After the district court had taken the full case under advisement following completion of briefing and oral argument, two groups moved to intervene with respect to the remedy for Exxon's overcharges. One was a group of crude oil refiners that conceded that the remedy issue was a purely legal question capable of resolution by summary judgment on the existing record. See R. 38337. The other was a group of independent gasoline retailers that did not offer any evidence or request a hearing. See R. 38986. After entry of judgment, various other groups sought to intervene. The district court granted each application to intervene for purposes of appeal. Pet. App. 82a n.45, 130a-134a. Given the content and timing of the remedy petitioners' motions in the district court, the full consideration of their arguments by the court of appeals, and the legal nature of the question of the district court's authority to adopt the restitutionary remedy that it ordered, there is no doubt that the remedy petitioners were afforded ample opportunity to be heard. Indeed, many of their arguments should properly be considered waived in view of the proceedings in the district court.

mutually contradictory theories for why each of them has the most compelling claim to the award.

a. The district court's order represents an unexceptional exercise of its broad equitable discretion to make restitution in a workable manner consistent with the goals of the statutory and regulatory scheme. TECA affirmed on the basis of its understanding of the operation of a complex set of regulations, no longer in effect, that governed pricing decisions in the petroleum industry. The court of appeals simply upheld one possible remedy as having appropriately been adopted in this case, without mandating the same approach in future cases. Moreover, the remedy adopted by the district court has no application outside the narrow confines of the now-defunct price control program because of the special nature of the government's cause of action and the unusual operation of the regulations at issue. See, *e.g.*, *In re DOE Stripper Well Exemption Litigation*, 578 F. Supp. 586, 592-593 (D. Kan. 1983) (noting differences between public price control and private antitrust actions). Finally, DOE recently has developed a restitutionary policy and proposed legislation that would apply to overcharges recovered in other oil price control cases. See 85-444 Pet. App. B1-B10, B14, B19-B22. In view of the factbound nature of the decision below, the procedural circumstances in which it was made, and its lack of continuing importance, further review by this Court is not warranted.

b. In any event, the remedy fashioned by the district court is well within the broad scope of its remedial power " 'to do equity and to mould [its] decree to the necessities of the particular case.' " *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946), quoting *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). Under the "Entitlements Program" then in effect, refiners with proportionally greater access to lower-priced old oil were required to make cash payments to refiners with relatively less access to such oil. In this way, the regulations "spread the benefits of access

to old price-controlled oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, all regions of the country, and among all consumers of petroleum products." *Cities Service Co.* v. *FEA*, 529 F.2d 1016, 1021 (Temp. Emer. Ct. App. 1975), cert. denied, 426 U.S. 947 (1976); see Pet. App. 87a-88a. 247a-248a. Other regulations permitted refiners to pass through increased costs to their customers. Pet. App. 87a-89a, 249a. "As a result of the pervasive system of price controls which then existed, therefore, Exxon's overcharges * * * were borne by ultimate consumers of petroleum products throughout the entire country." *Id.* at 249a (footnote omitted).[28]

It is little wonder then that both courts below found that "[t]he broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each." Pet. App. 250a.[29] As the court of appeals concluded, "any attempt to trace increased costs attributable to the [Hawkins Field] overcharges

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[28] Certain of the remedy petitioners argue (*e.g.*, 85-430 Pet. 23) that this conclusion is questionable in light of the decontrol of prices of certain petroleum products before 1981. The absence of a specific regulation permitting refiners to pass through increased costs for those products, however, does not mean that the additional costs were not in fact passed through, nor does it simplify the ultimate task of identifying the actual victims of Exxon's overcharges and the extent of their injury. See generally *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968) (noting difficulty of determining actual effect of price change "in the real economic world rather than an economist's hypothetical model").

[29] Indeed, it was admitted by many of the parties below that any attempt to trace the overcharges would be impossible. See Memorandum in Support of Conditional Motion of Indicated Refiners to Intervene 5, R. 38973 ("it is impossible to trace the impact of the overcharges directly to any subsequent purchasers"); Memorandum of National Freight et al. in Support of Motion to Intervene 2, R. 38547 ("it is administratively impracticable to attempt to entertain specific claims based on specific overcharges to identified customers"); Gladieux Br.

would require a full scale audit of the entire petroleum industry, and * * * any effort to do so would be futile." *Id.* at 88a. There is no basis for this Court to set aside this concurrent conclusion of both TECA and the district court.[30]

Nor is there any basis on which to disagree with TECA's

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9 ("[n]o such findings could possibly be made without an extremely time-consuming factual inquiry, one which is almost certainly beyond the capacity of any Court or administrative agency"); Marathon Br. 17 ("proving passthrough of overcharges would depend entirely on uncertain economic assumptions and impossibly complex measurements").

[30] The remedy petitioners rely on a report issued by DOE's Office of Hearings and Appeals (OHA) in another case (85-432 Pet. App. A321-A385) to argue (*e.g.*, 85-432 Pet. 13-14) that econometric modeling techniques are available that could identify within a broad range the percentages of overcharges that were absorbed by refiners. As OHA itself made clear, however (*e.g.*, 85-432 Pet. App. A343), and as DOE has reaffirmed, these figures "say [] nothing about the amount of the overcharges any particular refiner may have absorbed. * * * [S]ome refiners necessarily will have absorbed amounts less than the average while others obviously absorbed more." 85-444 Pet. App. B3 (DOE Statement of Restitutionary Policy). Thus, "any matching between the amount a particular refiner receive[d] and the amount of harm [that it] suffered * * * [would be] purely coincidental." *Id.* at B4. Moreover, "refunds based upon the econometric method developed by OHA would entail considerable administrative costs and very long delays before distribution. It could require further hearings or an individual claims procedure where innumerable direct purchasers could be given an opportunity to substantiate their individual claims. * * * The appropriateness of the burden, cost and delay of these further proceedings is problematic in view of the small percentage of the overcharges that would actually be distributed under such a method." *Id.* at B5-B6. Finally, even OHA's modeling estimates entailed "great inexactitude." *Id.* at B4; see 85-432 Pet. App. A383 (concluding that refiners as a class may have absorbed as little as 2.7% or as much as 8.1% of the overcharges). Certainly no court should be *required* to undertake the expense and delay of a claims procedure based on econometric models so inherently imprecise.

In a supplemental brief in support of their petition in No. 85-430, Marathon Petroleum Co., et al. (Marathon) attack OHA's actual report, primarily on the basis of correspondence from a Member of

conclusion that the remedy adopted by the district court is "equitable and fair, and a reasonable method of compensating the consuming public for the [Hawkins Field] overcharges." Pet. App. 91a. The district court modeled its remedy on the one adopted by Congress in the Warner Amendment, Pub. L. No. 97-377, § 155, 96 Stat. 1919-1920 (85-432 Pet. App. A316-A319), with respect to restitution of other petroleum overcharges. Pet. App. 254a-256a.[31] By earmarking funds for specific energy conservation programs, the Warner Amendment was designed "to benefit the class of persons injured by [oil price control] violations." 85-432 Pet. App. A316. Congress recognized that these conservation programs benefit the public at large by reducing our dependence on foreign oil. See S. Rep. 94-1119, 94th Cong., 2d Sess. 52 (1976); see also Pet. App. 256a. The remedy in this case thus "accomplishes the intent of Congress" (Pet. App. 91a) by

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Congress concerning an earlier draft of the report that was not adopted. TECA correctly rejected Marathon's eleventh-hour attempt to interject this incompetent and irrelevant evidence into the record (85-430 Supp. Br. App. 1a), and there is no reason for this Court to do otherwise. The OHA report recently was issued in a completely separate case and was not cited by either court in this action. See Pet. App. 80a n.43. The unsubstantiated allegations on which Marathon relies therefore could not possibly affect the outcome of the instant case.

[31] Contrary to the remedy petitioners' argument (*e.g.*, No. 85-430 Pet. 19), Congress did not intend through the Warner Amendment to prohibit courts from adopting similar restitutionary remedies in other cases. See 128 Cong. Rec. S15701 (daily ed. Dec. 20, 1982) (remarks of Sen. Kennedy). There is neither an express nor an implied indication in the Warner Amendment that Congress intended to limit the broad remedial authority inherently possessed by the courts in cases of this kind, see *Porter* v. *Warner Holding Co.*, 328 U.S. at 398, a limit that would have been a simple matter to articulate had Congress desired to do so. Finally, the district court made it clear that it was not relying on any implication of authority in the Warner Amendment itself but only on its "broad equitable powers to order restitution." Pet. App. 256a (footnote omitted).

helping "to relieve consumers of some of the burden of towering oil costs" (*id.* at 256a), a burden that was increased by "[t]he colossal scale of Exxon's wrongdoing" (*ibid.*). As TECA concluded (*id.* at 92a (footnote omitted)):

> While other remedies might have been adopted by the trial court, the remedy chosen avoids further administrative delay and confusion, with additional costs, it prevents the frustration of congressional objectives in securing prompt enforcement of what has been denominated as "emergency" price regulations, and it is a reasonable means to protect the public interest.

There is simply no warrant for upsetting the reasoned exercise of discretion affirmed below.

c. The remedy petitioners contend, however, that the failure of the courts below to permit them to present evidence of the fact and amount of their actual injuries was inconsistent with due process and restitutionary principles. This argument is completely without merit. This case is a government enforcement action pursuant to Section 209 of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note. As TECA repeatedly has emphasized, "[a]ctions by the United States under ESA Section 209 are taken to enforce public, not private rights." Pet. App. 82a-83a (quotation marks and citations omitted). Section 209 does not create a cause of action on behalf of private persons who were injured by violations of the petroleum price regulations—that was provided by Congress in Section 210 of the Act, which is not at issue here. Because the remedy petitioners were not entitled to recover damages by way of restitution in this action, due process did not require that they be permitted to present evidence in support of their claims. Indeed, as the court of appeals noted, they were not even proper intervenors as of right. Pet. App. 83a (quoting *Cities Service Co.* v. *DOE*, 715 F.2d 572, 573-574 (Temp. Emer. Ct. App. 1983)). Cf. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689

(1961); see also, *e.g.*, *United States* v. *Automobile Manufacturers Ass'n,* 307 F. Supp. 617 (C.D. Cal. 1969), aff'd *sub nom. City of New York* v. *United States,* 397 U.S. 248 (1969). The remedy petitioners thus were afforded ample, or more than ample, process by being permitted to raise their arguments below; nothing in the Due Process Clause requires that those arguments be accepted.

The cases on which the remedy petitioners rely (*e.g.*, 85-430 Pet. 12, 16) are unavailing. None of these cases establishes a protected property interest in a restitutionary fund that results from a government enforcement proceeding or otherwise requires that such a fund be distributed, whatever the administrative costs, on an individual basis to persons claiming to be the ultimate victims of illegal private activity. In *FPC* v. *Interstate Natural Gas Co.,* 336 U.S. 577 (1949), for example, funds had been paid into the court of appeals pursuant to that court's stay of an administrative order reducing natural gas rates. This Court held that, to the extent possible without "prolonged litigation," the court of appeals was required to "determine who suffered a loss as a result of the court's action in granting the stay." *Id.* at 584. Nothing in the Court's opinion purports to impose a duty on courts of equity to hold proceedings to attempt to identify the ultimate victims of an overcharge (especially one not resulting from an erroneous court order) where that has reasonably been determined to be impossible. Similarly, in *Porter* v. *Warner Holding Co., supra,* the Court held only that federal courts possess inherent equitable authority to order that a landlord's overcharges, which violated the Emergency Price Control Act of 1942, be restored to its tenants. The Court did not undertake to limit that equitable authority in the manner for which the remedy petitioners contend.

In sum, the restitutionary remedy under Section 209 is a government enforcement mechanism whose "central purpose * * * is to determine the amount by which the wrong-

doer has been unjustly enriched, and then to make him disgorge that amount." *Citronelle-Mobile Gathering, Inc.* v. *Edwards,* 669 F.2d 717, 722 (Temp. Emer. Ct. App.), cert. denied, 459 U.S. 877 (1982).[32] Section 209 "is not designed to provide redress for a victim who has suffered an injury because of a violation of a [price control] regulation." *Bulzan* v. *Atlantic Richfield Co.,* 620 F.2d 278, 282 (Temp. Emer. Ct. App. 1980). If compensation results, it is only as a "by-product of the agency's effort to reestablish compliance with its regulatory scheme." *Ibid.* Accordingly, Section 209, which evinces no intention "to limit the power of the courts or the agency * * * to a particularly strict interpretation of restitution," *Sauder* v. *DOE,* 648 F.2d at 1348, neither establishes in private persons an entitlement to disgorged funds nor requires a wasteful and ultimately futile attempt to determine the extent to which various persons or groups of persons were injured. While the district court was not compelled to shape the remedy precisely as it did, it acted well within its discretion by patterning the remedy after one established by Congress and directing that the funds be used in a manner that will help to undo the damage caused by the regulatory violations in this case.

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[32] TECA carefully distinguished the factual circumstances presented here from those in *Citronelle-Mobile,* which, it observed, involved only a single refiner, a single product, and identifiable customers. See Pet. App. 85a-87a. Even if the remedy petitioners were correct in contending (*e.g.,* 85-432 Pet. 24) that there is a conflict between that case and this one, the existence of such an intra-circuit conflict, which TECA is well able to resolve in the future, would be an argument against, not for, review here. *Wisniewski* v. *United States,* 353 U.S. 901, 902 (1957).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1985

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* The Solicitor General is disqualified in these cases.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1985—491-507/20108

Supreme Court, U.S.
FILED
MAR 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-429

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EXXON CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

REPLY MEMORANDUM FOR THE PETITIONER

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REPLY MEMORANDUM FOR THE PETITIONER

This case is full of difficult and substantial questions concerning the justice and legality of an extraordinary monetary exaction. It is regrettable that the government dismissively papers over the difficulties of the case and obscures the many ways in which the agency and the lower courts have departed from fundamental principles of administrative due process.[1]

The government creates a very misleading impression of the factual and regulatory context in which this case arose. *First*, the government inaccurately portrays the events leading up to, and the economic consequences resulting from, unitization at Hawkins Field. The government alleges that Exxon and the other interest owners knew that adoption of a unit BPCL would be required upon unitization and that they nonetheless voted to unitize because "[u]nitization was attractive even under the unit BPCL requirement . . . " Br. in Opp. 14 n.12. *See also id.* at 9, 19 & n.19. The government both misrepresents the evidence and disregards—as it does throughout its brief in opposition—the rule that, on summary judgment, the facts and the record must be construed in the light most favorable to the nonmovant. *See, e.g., Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).[2] At the time of unitization, Exxon did not believe or advise the other interest owners that a unit BPCL would be required. *See* Pet. 7. In alleging the opposite, *see* Br. in Opp. 9, the government quotes from an internal Exxon memo-

[1] The government even makes the Orwellian suggestion that Exxon has been made the beneficiary of "lenient," "relaxed," "less stringent" treatment. Br. in Opp. 6, 20. The district court explicitly rejected those characterizations. Pet. App. 211a-212a.

[2] Exxon moved for summary judgment on certain regulatory issues but took the position that central questions in the case—in particular, the occurrence of a significant alteration in producing patterns and the existence of a reasonable alternative date for adoption of a unit BPCL—were inherently factual and required a trial. R. 27682-85, 30423-28.

randum that was not distributed to the other interest owners. R. 16832-34. The memorandum had been prepared before Exxon became aware that FEA was advising other producers that the regulations permitted units to continue lease-by-lease accounting, and it was that advice which "formed the basis for [Exxon's] decision to alter its prior practices [at other units] and adopt individual lease accounting at the Hawkins Field." Pet. App. 232a. Unitization would not have taken place if the interest owners had known that a unit BPCL would be required. *See* Pet. 5-6, 21. Requiring immediate adoption of a unit BPCL would render the entire unitization project seriously uneconomic, because the loss of large quantities of new oil caused by immediate adoption of a unit BPCL would more than offset the additional revenues generated over time by enhanced recovery. *See id.* at 6 and n.7.[3]

Second, the government makes much of the fact that, after unitization, production at Hawkins Field increased at some leases and decreased at others; indeed, the government appears to assert that this "shift of production" alone mandated adoption of a unit BPCL. *See* Br. in Opp. 4, 10, 12, 20, 23. But the record demonstrates that the shift of production from marginal leases to more capable leases was part of a continuing process that had begun long before unitization. *See* Pet. 5 n.5.[4] All the petroleum engineering experts deposed in this case agreed that prior to March, 1977, unitization had had no

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[3] The projection of a $250 million profit that the government cites, *see* Br. in Opp. 9, was made before the institution of two-tier price controls. *See* R. 23880-82, 23410. Consequently, it did not contemplate the loss of large quantities of higher-priced new oil that would be caused by immediate adoption of a unit BPCL. It is that loss (quantified by the judgment below) that renders the project uneconomic.

[4] The government tries to plant the suspicion that Exxon was involved in "gerrymandering of boundaries undertaken to avoid price controls," Br. in Opp. 4, but the district court held that the government had failed to prove its contention "that Exxon in fact gerrymandered production." Pet. App. 260a.

substantial effect on this process, *i.e.*, that unitization had not caused significant incremental shifting of production. *See id.* at 17 n.15.

Third, the government repeatedly complains that Exxon's "lease-by-lease accounting practices . . . resulted in increasing amounts of new oil being reported even as actual production declined." Br. in Opp. 20. *See also id.* at 10-11, 18, 21 n.21, 24.[5] Actually, production at Hawkins Field increased between 1972 and September 1, 1976, and unitized operations were responsible for a portion of this increase. R. 31493-95. The annual rate of production declined thereafter, but such a decline is an inevitable part of the life-cycle of a mature producing field. The important point is that enhanced recovery served to slow or "arrest the declining production curve," R. 28775, thereby saving some 70 million additional barrels of crude oil. *See* Pet. 8. Enhanced recovery at Hawkins Field therefore unquestionably accomplished the regulatory objective of increasing the availability of domestic crude oil.[6] The amounts of new oil reported at Hawkins Field after September 1, 1976, simply reflected deliberate federal policy, *i.e.*, the encouragement of enhanced recovery reflected in the "imputed new oil" rule of 10 C.F.R. § 212.75.[7]

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[5] The government fails to acknowledge that increasing amounts of new oil also would have been reported in the absence of unitization. *See* Pet. 5 n.6. FEA explained many years ago that the regulations permitted the reporting of increased volumes of new oil, even as total production decreased, in any field governed, as is Hawkins Field, by Maximum Efficient Rate ("MER") rules. 41 Fed. Reg. 1564, 1571-72 (1976). *See also* Pet. 5 n.5.

[6] The government acknowledges that encouraging production was an important goal, Br. in Opp. 17-18, but prefers to emphasize that "one purpose of price controls was to control prices." *Id.* at 18 n.17. The two goals were intertwined: increasing the availability of domestic crude oil meant decreasing the importation of higher-priced foreign oil.

[7] One of the principal issues in this case concerns DOE's effort to deny to Hawkins Field the benefit of imputed new oil. The

Fourth, the government repeatedly creates the impression that FEA's Ruling 1975-15, which construed 10 C.F.R. § 212.72 to require adoption of a unit BPCL immediately upon unitization, for all practical purposes remains good law. *See, e.g.*, Br. in Opp. 4, 5, 11, 12, 16-17, 19-20, 21. It is appalling that the government would assert that "petitioner fails to give due deference to DOE's own interpretation . . . that Section 212.72 required a unit BPCL immediately upon unitization, an interpretation faithful to the language of the regulation and to the underlying statutory and regulatory purposes." *Id.* at 18. The agency itself squarely disavowed "DOE's own interpretation" when it rescinded Ruling 1975-15 *ab initio*, and it did so precisely because that interpretation was inconsistent with the regulatory purpose of encouraging enhanced recovery. *See* Pet. 8-11. FEA expressly repudiated the view, still urged by the government here, that § 212.72 should be read as requiring adoption of a unit BPCL immediately upon unitization and before the occurrence of a significant alteration in producing patterns.[8]

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government seeks to obscure this issue by consistently describing 10 C.F.R. § 212.75, with its benefit of imputed new oil, as applying only to units formed on or after February 1, 1976. *See* Br. in Opp. 5, 6, 8, 10. That is legal argument, not description. Nothing in the regulatory text limited the regulation's application to units formed on or after February 1, 1976 (or any other date). The regulatory preamble explicitly stated that units formed before that date would be subject to the new regulation. 41 Fed. Reg. 4931, 4937 (1976). Even FEA's Ruling 1977-2, which otherwise sought to contract the reach of § 212.75, acknowledged that it applied at least to some units formed before February 1, 1976. 42 Fed. Reg. 4409, 4414-15 (1977).

[8] The government now admits, for the first time in this case, that "several" (it should have said "all") of FEA's interpretations prior to Ruling 1975-15 were secret and therefore cannot be used against Exxon (and by implication were improperly relied upon by both the district court and the court of appeals). Br. in Opp. 18 n.18. Yet, curiously, the government repeatedly invokes those very interpretations to support its position here. *See* Br. in Opp. 4 n.4, 11, 18.

By ruling that units would be required to adopt a unit BPCL only when there had been a significant alteration in producing patterns, FEA was attempting to accomplish two very different objectives: to encourage enhanced recovery but at the same time to prevent artificial increases in new oil above levels that could have been reported in the absence of unitization. Lease-by-lease accounting at Hawkins Field—which only continued until September 1, 1976—was consistent with both of those objectives. It preserved the economic rationale for enhanced recovery by protecting against the arbitrary loss of new oil, yet it did not result in the reporting of inflated volumes of new oil. *See* Pet. 8.

We turn to the government's specific legal arguments on the merits of the questions presented.[9]

1. In its petition, Exxon showed that TECA fundamentally erred in adopting a construction of 10 C.F.R. § 212.72 that had been repudiated by FEA as substantively invalid. Pet. 27-29. The government's response is a model of avoidance and obfuscation.[10]

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[9] The government self-righteously attacks Exxon for calling the Court's attention to scholarly criticism of TECA. *Compare* Pet. 27 n.24 *with* Br. in Op. 15 n.13. The article we cite from the *Duke Law Journal*, which harshly criticizes TECA for exhibiting an "institutional bias" in favor of the government, was written by a law professor who had acquired substantial first-hand experience with TECA as a government attorney. *See* 1978 Duke L.J. at 113 n.*, 151. The American Bar Association, when it adopted a resolution urging Congress not to create another similarly constituted temporary emergency court of appeals in connection with any future emergency program, in part was responding to that and other such criticisms of TECA, which were referred to at pages 8 and 9 of the *Recommendations and Report* that we also cite.

[10] The government contends, first, that TECA's construction—requiring the adoption of a unit BPCL immediately upon unitization—was correct because TECA also had applied the same construction in other cases. Br. in Opp. 16-17. That contention, of course, is sheer bootstrapping. Moreover, of the four cases cited by the government only *Pennzoil Co. v. DOE*, 680 F.2d 156 (TECA

When the government finally addresses the real issue—TECA's enforcement of a regulatory interpretation that had been repudiated by the agency—it attempts to enshroud that issue in confusion. Br. in Opp. 19-20. The matter, however, is quite clear: when it rescinded Ruling 1975-15, FEA determined that a unit is a "property" required to adopt a unit BPCL *only* when there has been a significant alteration in producing patterns. The government offers no justification for TECA's refusal to abide by that official construction of the agency's own regulations.[11]

2. TECA's retroactive and discriminatory application of the August, 1976, amendments to 10 C.F.R. § 212.75 violated three important principles of administrative due process. Pet. 29-35. With respect to retroactivity, the government makes only one argument (although it is phrased to sound like two)—that retroactive application of the arbitrary and harsh August, 1976, definition was not prejudicial because otherwise Exxon would have been required under § 212.72, as construed by Ruling 1975-15, to adopt a unit BPCL immediately upon unitization. Br.

1982), *cert. dismissed*, 459 U.S. 1190 (1983), even arguably conforms to the government's description.

The government then introduces a straw man by mischaracterizing Exxon's argument, which is not that the regulation "required lease-by-lease accounting," Br. in Opp. 17, but rather that, as FEA specifically stated when it rescinded Ruling 1975-15 *ab initio*, the regulation permitted lease-by-lease accounting before the occurrence of a significant alteration in producing patterns.

The government next introduces a second straw man—estoppel—and, in the course of thrashing it, once again misrepresents the facts relating to the formation of the unit. *Compare* pages 1-2, *supra*, *with* Br. in Opp. 19.

[11] Indeed, the government elsewhere seems to disavow TECA's plainly improper ruling on this point by asserting that Exxon's liability really rests only upon the alleged occurrence of a significant alteration in producing patterns and not upon "the immediate unit-wide BPCL requirement." Br. in Opp. 17 n.16. That appears to be a very muted confession of error.

in Opp. 21-22. That argument, of course, collapses in the face of the agency's rescission of Ruling 1975-15.

Retroactivity is a crucial element of the government's case. The underlying question here is whether a significant alteration in producing patterns occurred at Hawkins Field before Exxon adopted a unit BPCL on September 1, 1976—a question that by its very nature requires the weighing and evaluation of evidence with respect to producing patterns. That necessarily is a matter for trial *unless* the arbitrary August, 1976, definition is applied retroactively—an application for which the government offers no meritorious rationale. If this Court rejects retroactive application and remands the case for trial, Exxon almost certainly will prevail: all of the expert witnesses—even DOE's—agree that producing patterns remained essentially unchanged at Hawkins Field until the implementation of enhanced recovery in March, 1977. *See* Pet. 17 n.15.[12] Thus, there is nothing "puzzling" or "curious," Br. in Opp. 12, 21, about Exxon's argument against retroactivity.

The government leaves wholly unexplained the irrationality of the classification used by the agency in awarding and denying the crucial benefit of imputed new oil. The government irrelevantly states that "it was completely reasonable not to apply the incentive provisions . . . to pre-existing units." Br. in Opp. 22. The legal issue here arises precisely because the benefit of imputed new oil—which was intended to provide mitigation as well as incentive—was denied to Hawkins Field but granted to many other "pre-existing units," *i.e.*, units formed before that benefit was added to the regulations on September 1, 1976. The benefit was made available to units formed on or after February 1, 1976, even if they

[12] The government argues throughout that Exxon would not be able to meet even the generic standard of "significant alteration in producing patterns." *See, e.g.*, Br. in Opp. 21 n.21, 24. The government's hopes in that regard, however, do not justify denying Exxon an opportunity to prove its case at trial.

had experienced a significant alteration in producing patterns before September 1, 1976; and it was even made available to some units formed before February 1, 1976. *See* Pet. 15, 18, 22 n.20, 33-34. The government is quite unable to justify or defend this discrimination.[13]

3. By denying Exxon a hearing on the question of a reasonable alternative date for adopting a unit BPCL, the lower courts not only approved but participated in a violation of the *Accardi* doctrine. Pet. 35-38. The government tries to brush aside this serious constitutional issue with the nonsensical argument that the occurrence of an alleged "substantial shift in production" made any alternative date "unreasonable as a matter of law." Br. in Opp. 23. Whether a shift in production rendered alternative dates unreasonable is precisely the kind of issue that can only be decided in a hearing of the sort contemplated and promised by Ruling 1977-2. The asserted shift in production was simply the natural evolution of a mature field governed by state MER rules—an evolution that would also have occurred in the absence of unitization—and the amounts of new oil actually reported approximated those that would have been reported in the absence of unitization. *See* pages 2-3, *supra*.[14] Those are appropriate factors for consideration under Ruling 1977-2, and Exxon has been denied any opportunity to present them to either the agency or the courts.[15] Moreover, the

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[13] The government's suggestion that the discrimination should be cured by withdrawing, long after the fact, the benefits conferred on other pre-existing units, Br. in Opp. 23 n.22, is simply bizarre.

[14] The evidence upon which the government relies is insubstantial. The supposedly dramatic "finding" (how the district court could purport to make findings on summary judgment has never been explained) that there was a "shift of 'almost 20 percent of 1975 production * * * across lease lines,' " Br. in Opp. 24, is just the district court's questionable interpretation of a handwritten note that had little intrinsic probative value. *See* R. 25506.

[15] The government's contention that the "courts below fully credited petitioner's evidence," Br. in Opp. 23, is absurd. Exxon's

alternative date Exxon advocates—the implementation of enhanced recovery in March, 1977—could not conceivably be unreasonable as a matter of law, because as early as February, 1976, the agency itself identified the "implementation of enhanced recovery" as an alternative date for adoption of a unit BPCL. *See* Pet. 11 n.11.[16]

4. TECA erroneously construed and applied section 209 of the ESA in a manner that destroys its essential character as an equitable remedy. Pet. 38-41. The government largely refuses to join issue on this point, limiting its response almost exclusively to the doctrine of "operator liability" without even attempting to square that doctrine with the language of the statute. *See* Br. in Opp. 24-27. In doing so, the government relies upon an asserted identity between this case and *Christmann & Welborn v. DOE*, 773 F.2d 317 (TECA), *cert. denied*, 54 U.S.L.W. 3252 (Oct. 15, 1985); the government justified the result there, however, on the ground that the operator had "made pricing decisions on behalf of all the owners" (No. 85-81, Br. in Opp. 9), whereas Exxon did not do that here. *See* Pet. 7, 23 n.22.[17]

* * * *

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evidence with respect to the question of a reasonable alternative date was "not before the court," Pet. App. 226a n.38, because Exxon contended that that question could not be decided on summary judgment. *See* note 2, *supra*. (The government distorts this procedural background out of recognition by stating that Exxon "had not actually contended that its evidence established a reasonable alternative date." Br. in Opp. 12 n.9.)

[16] It is outrageous for the government to muddle the issue by speaking in terms of an "underground drive mechanism [that is] too complex and amorphous to be relied upon as a workable regulatory standard." Br. in Opp. 24. The implementation of enhanced recovery is readily auditable, for it is marked by the above-ground manufacture and injection of inert gas.

[17] The government chooses to ignore such obvious problems as the lower courts' assessment of prejudgment interest at grossly excessive rates, *see* Pet. 20 n.18, including hundreds of millions of

The government relies heavily on the notion that review must be denied because TECA has nationwide jurisdiction and the regulatory program has expired. Br. in Opp. 15. Yet, the United States has not hesitated to seek review, and this Court has granted review, in precisely such cases in the past where, as here, the government is contesting with private parties over enormous sums of money. *See, e.g., United States v. Chicago, B. & Q. R. Co.*, 412 U.S. 401 (1973).[18] The decision below works such a manifest injustice, and imposes such a staggering and improper monetary liability on a single litigant, that it cries out for correction. *Cf. Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973). In these circumstances, and for the many reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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dollars of interest on money that Exxon not only never had received but actually had paid to other interest owners.

[18] That case involved a decision by the Court of Claims construing an expired provision of the Internal Revenue Code of 1939; the amount of taxes potentially in controversy there was considerably less than the amount at stake here. *See* 412 U.S. at 404-05 n.6.

MOTION FILED
DEC 27 1985

No. 85-429
No. 85-430

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EXXON CORPORATION, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Respondent.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE

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QUESTION PRESENTED

Whether existing law imposes any restraints or guidelines on a court's power to effect restitution beyond requiring the defendant to forfeit his unjust enrichment.

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On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE

The American Petroleum Institute (API) submits this brief *amicus curiae* in support of the petitions for writ of certiorari filed by Exxon Corporation, No. 85-429, and Marathon, *et al.*, No. 85-430.

INTEREST OF THE AMICUS CURIAE

API is a trade association representing approximately 215 member companies and 8,000 individual members. API's members are engaged in all facets of the petroleum industry including the production, refining, and market-

ing of crude oil and refined petroleum products. Throughout the time periods involved in this case, API members were subject to the price and allocation laws and regulations adopted by the Congress and the Department of Energy (and its predecessor agencies) governing the sale and distribution of crude oil and petroleum products.

API members have a direct interest in the remedy entered and affirmed by the lower courts disposing of almost $2 billion for alleged overcharges associated with the sale of crude oil produced from the Hawkins Field. By affirming the district court's award of all alleged overcharges to the states in accordane with Section 155 of the Furthering Continuing Appropriations Act of 1983, commonly known as the "Warner Amendment," Pub.L. No. 97-377, §155, 96 Stat. 1830, 1919 (1982), the Temporary Emergency Court of Appeals (TECA) categorically and arbitrarily denied members of the petroleum industry, including many API members, their due process rights to demonstrate they were entitled to receive a portion of the refund.

The decision below is troubling in several other respects to industry at large, particularly insofar as it enforces a regulatory interpretation that was expressly repudiated by DOE, subjects a firm to retroactive application of a rule that was not intended to be retroactive, enforces unjust and discriminatory classifications among crude oil producers, and permits DOE to ignore its own rules, as set forth in the petitions.

API files this *amicus curiae* brief, however, for the limited purpose of asking the Court in particular to rectify the unfair and unprecedented denial of the legal rights of its members with respect to the issue of remedy – a matter which unquestionably affects their economic interests.

ARGUMENT

On July 1, 1985, a majority of the Temporary Emergency Court of Appeals (TECA) affirmed a District of Columbia U.S. District Court holding that Exxon Corporation had violated the Department of Energy's two-tier crude oil price regulations, 10 C.F.R. §§212.73, 212.74 (1975). *United States v. Exxon Corp.*, 4 ENERGY MGMT. (CCH) ¶26,539 (TECA July 1, 1985). TECA also affirmed the District Court finding that Exxon was liable in restitution for $1.6 billion in overcharges and interest and that court's award of the refund to the states for distribution by them.

The lower courts entered a remedy in flagrant disregard of controlling legal precedent. The TECA majority opinion assumed that a court's restitutionary duty begins and ends when it requires a defendant to forfeit his "unjust enrichment." This assumption ignored the decisions of this Court addressing the restitutionary powers and duties of the judiciary, and instituted a remedy that suggests the courts possess unbridled restitutionary powers.

The comprehensive dissenting opinion filed by Judge Becker of TECA provides a textbook analysis of the applicable law on the restitutionary authority of the courts, the notice and hearing required by due process before distribution of a court-created fund, intervention and interpleader and the inappropriateness of reliance on the Warner Amendment in the instant case. When this thorough dissent is contrasted with the TECA majority opinion and the stark lack of legal analysis therein, it seems quite apparent that error was committed below.

This Court has articulated some specific principles to guide courts in restitution cases similar to the case at bar. The Court below made no attempt to comply with those

decisions. Instead, it assumed it was under no duty to undertake any type of systematic inquiry with respect to the determination of the identity of those suffering losses as a result of the alleged wrongful acts and affirmed a restitutionary remedy on summary judgment despite the existence of contraverted issues of material fact.

This Court should review the lower court's cavalier disregard of judicial responsibility in effecting restitution. We believe this Court should remand this case with an opinion that will ensure that the huge sums at issue here, and funds which may be distributed in future cases, are handled in a systematic and equitable fashion that will more nearly accomplish a return to the status quo — which is one of the basic objectives of the restitution doctrine.

I. THE TECA MAJORITY ENTERED A REMEDY CONTRARY TO THE CONTROLLING LAW OF RESTITUTION AND WITHOUT PROVIDING TO POTENTIAL CLAIMANTS NOTICE AND AN OPPORTUNITY TO BE HEARD

The judicial power to order restitution arising from alleged price control violations is found at Section 209 of the Economic Stabilization Act, which authorizes the Courts to ". . . order restitution of moneys received in violation of any such order or regulation." 12 U.S.C.A. §1904 note (1980).

The dissenting opinion filed by Judge Becker demonstrates, by surveying the controlling law on the judicial duty and power to order restitution, that the federal courts have comprehensive equitable power to order restitution, but that power is not totally unlimited. 4 ENERGY MGMT. (CCH) ¶26,539 at 26,433. The cases cited by Judge Becker also describe the *nature* of that equitable restitutionary

power. *Id.* at 26,433-439. Having described the nature of the courts' restitutionary powers, Judge Becker then concludes that potential claimants to the fund created by the court have a protected property right to restitution of damages, and further, that the Due Process clauses of the Fifth and Fourteenth Amendments require some form of hearing before depriving those parties of their property interest. *Id.* at 26,444-447. API submits that when Judge Becker's analysis of the controlling precedents is contrasted with the conclusions reached by the majority opinion, it is apparent that the majority completely disregarded the applicable law articulated by this Court.

A. CONTROLLING DECISIONS DEMONSTRATE THAT TECA IN EFFECTING RESTITUTION SHOULD HAVE ATTEMPTED TO RESTORE THE STATUS QUO AND TO GIVE EFFECT TO THE STATUTORY PURPOSES

Although the cases cited by Judge Becker stand for the proposition that the courts possess broad equitable powers to effect restitution, those cases clearly articulate guidelines for the courts to follow in restitution cases. Most notably, this Court has stated that a court in equity may give "*complete relief in light of the statutory purposes.*" *Mitchell v. De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (emphasis added). This Court has set forth two important principles which are to govern judicial restitution in price control regulatory programs. First, the remedy must "protect the public interest while giving necessary respect to the private interest involved." *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946). Second, the restitution order should "enforce compliance with the Act" and "give effect to its purposes." *Id.* at 400. These principles are satisfied when the courts act "by restoring the status quo

and ordering the return of that which rightfully belongs to the purchaser or tenant." *Id.* at 402. The notion that a court in effecting restitution should attempt to restore the status quo was echoed in *Federal Power Comm'n v. Interstate Natural Gas Co.*, 336 U.S. 577 (1949), wherein Justice Douglas indicated that the Court's duty in administrating a fund of rate overcharges was to "undo the wrong" by identifying those who had suffered a loss. Justice Douglas stated:

> In conclusion, the task of the federal court in distributing the fund accumulated by virtue of its stay order is to undo the wrong which its process caused. The basic problem, therefore, is not to fix rates but to determine who suffered a loss as a result of the court's action in granting the stay. What in fact would have happened as a consequence of federal or state law if the stay had not been issued, no one can know for a certainty. But the federal court must make its prognostication, whether an excursion into federal or state law questions is entailed. Distribution of the fund should not involve prolonged litigation. It is an administrative matter involving the exercise of an informed judgment by the federal court and should have the flexibility and dispatch which characterized the administrative process.

Id. at 584.

In sum, the law of restitution as enunciated by this Court suggests that two principles should guide the courts in effecting restitutionary remedies in analogous cases. First, it is the responsibility of the court to attempt to restore the status quo, *Interstate Natural Gas*, 336 U.S. 577, and second, the court should attempt to effect the purposes of the underlying statute, *United States v. Morgan*, 307 U.S. 183 (1939). The TECA majority disregarded both principles.

1. TECA Disregarded Its Duty to Restore the Status Quo

In stark contrast to the principles enunciated by this Court, the TECA majority concluded it was under no duty to reestablish, or even attempt to reestablish, the status quo. TECA premised that conclusion on the assumption that such a task would be "impossible," without the benefit of any evidence to prove or disprove that ascertaining and compensating injury would in fact be "impossible." The court said:

> "[T]here was no need for the District Court in this action to attempt the impossible task of attempting to ascertain the damage sustained by individual consumers of petroleum products."

United States v. Exxon Corp., 4 ENERGY MGMT. (CCH) ¶26,539 at 26,427. The TECA majority determined its only duty in effecting restitution to be:

> "to determine the amount by which the wrongdoer has been unjustly enriched and then to make him disgorge that amount. *No proof is required that the plaintiff was damaged, much less the amount of any damage."* (emphasis in original).

Id. at 26,425 *citing Citronelle-Mobile Gathering, Inc. v. Edwards,* 669 F.2d 717, 722 (TECA 1982), *cert. denied,* 459 U.S. 877 (1982). TECA thus determined that its only duty in effecting restitution was to ascertain the amount of the defendant's "unjust enrichment" and force him to disgorge that amount, without regard to the identity or extent of injuries sustained as a result of the alleged wrong.

2. TECA Failed to Give Effect to The Statutory Purposes

TECA also entered a remedy that fails to comport with this Court's requirement that a fund should be distributed in accordance with the purposes of the underlying statutes. *Porter,* 328 U.S. at 400. The Economic Stabilization Act, 12 U.S.C.A. §1904 note (1980), sought to stabilize prices, especially those associated with crude oil and petroleum products, for all sectors of the economy, and to maintain and promote competition within the petroleum industry. The Emergency Petroleum Allocation Act as amended by the Energy Policy and Conservation Act, 15 U.S.C.A. §751 *et seq.* (1982), recognized the need to fairly distribute crude oil and refined products throughout the petroleum industry and to allow members of the industry to recoup appropriate costs. In short, these Acts, together with the federal regulatory programs implementing their provisions, were designed to benefit the entire American economy, public and private. Nothing in these Acts suggested that individual consumers as a class were *per se* to be protected over other groups. Instead, the programs were intended to work by calling for "generally comparable sacrifices by business and labor as well as other segments of the economy." ESA Section 203(b)(5), 12 U.S.C.A. §1904 note (1982).

API maintains that the method for allocating these "sacrifices" among all segments of the economy was decided by DOE and reflected in the framework of the DOE regulations. Therefore, in order to carry out the statutory purpose the lower courts were required to make a realistic attempt to use these regulations. Instead, the TECA majority arbitrarily dismissed their use as "futile" and distributed the funds to the states for the benefit of a special class of consumer. Though such persons were pro-

tected by the statutes and regulatory program, they were no less protected than any other aggrieved group, including members of the petroleum industry. API submits that to the extent a party absorbed a loss attributable to the alleged overcharges, he or she was within the scope of congressional concern and is a candidate to qualify for a portion of any restitutionary award. Such an award would be consistent with the public and the private interests identified in these statutes and the underlying regulatory program.

The remedy chosen by TECA, instead of resting upon established equitable principles, is premised upon the unsupported judgment that the petroleum industry passed through the alleged Hawkins Field overcharges to ultimate consumers. By thus eschewing the systematic guidelines of this Court and awarding the money at issue to the states on the basis of its assumptions about industry practice, TECA has endorsed extreme judicial activism. The judicially legislated remedy has established questionable precedent for future refund cases. The opinion suggests a policy whereby once a defendant has been divested of alleged "unjust enrichment," a court is free to award the fund to whomever it chooses, without conducting any inquiry into who suffered loss. The courts thus would have seemingly unbridled discretion to act in the public interest* when effecting restitution.

If the restitutionary principles enunciated by this Court are ignored, then no restraints check the restitutionary

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*For a complete discussion of why the remedy selected by TECA was not in the public interest, see Judge Becker's discussion of the inappropriateness of relying on the Warner Amendment. 4 ENERGY MGMT. (CCH) ¶26,539 at 26,455.

powers of the courts. Review of this case will ensure that the substantial sums of money involved in this and other pending DOE price control cases are properly distributed as intended by Congress.

B. THE TECA MAJORITY OPINION DEPRIVES INJURED PARTIES OF DUE PROCESS WITHOUT ANY FORM OF NOTICE AND HEARING

As Judge Becker noted in his dissenting opinion, the right to restitution of damages caused by an alleged violation of law is a property right under the Due Process clauses. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Accordingly, the Constitution requires at a minimum notice and an opportunity for comment appropriate to the case. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950).

The remedy entered by the district court denied all potential claimants to the restitutionary fund an opportunity to come before the court to be heard. Moreover, the briefing opportunity parties had before TECA cannot be said to have cured the denial of due process:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. . . . But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.

Fuentes v. Shevin, 407 U.S. 67, 81-82 (1972). In *Porter v. Warner*, this Court indicated that the judiciary has "inherent power to bring all the interested parties and settle the controversies. . ." 328 U.S. at 403. This comports with the Court's action in *Central States Electric Co. v.*

City of Muscatine, where the fund was ordered to be held a "reasonable time to permit interested pesons to litigate the issue in a tribunal having jurisdiction. . .", 324 U.S. 138, 146 (1945). Distribution of a fund should not involve prolonged litigation, *Interstate Natural Gas,* 336 U.S. at 584, but neither should it ignore procedural due process guaranteed under the Fifth Amendment. Time limitations, special masters, and other administrative devices were available to the district court to expedite the case and still afford parties their constitutional rights.

II. SUMMARY JUDGMENT WAS IMPROVIDENTLY GRANTED BECAUSE ISSUES OF MATERIAL FACT WERE IN DISPUTE

A. MATERIAL FACTS WERE IN DISPUTE

The District Court concluded categorically that only consumers of petroleum products bore the alleged Hawkins Field overcharges. *United States v. Exxon Corp.,* 561 F. Supp. 816, 853 (D.D.C. 1983). Without the benefit of any briefing or evidence, the Court held that the incidence of the presumed injury could not be ascertained and compensated. The TECA majority opinion takes a slightly different approach. Using the same incomplete factual record before the district court, the TECA majority describes in detail how difficult it would be to determine who had borne the alleged overcharges. "Futility," however, is not a legal question, it is one of fact. Although the TECA majority opinion admits the possibility that many different parties could have absorbed the alleged overcharges, including resellers, retailers, and consumers, it merely concludes it is under no duty to determine who sustained injury and affirmed the granting of summary judgment.

Summary judgment as a matter of law should be granted only when no genuine issue as to any material fact remains for trial. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944); FED.R.CIV.P. 56. The moving party carries the burden of showing the absence of genuine issue as to any material fact and all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the opposing party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

API submits that at least three material facts are clearly in dispute: (1) who absorbed the impact of the alleged Hawkins Field overcharges; (2) in what amounts; and (3) whether it is impossible to find a way to compensate.

The TECA majority and the District Court's assertions of the "impossibility" of answering these questions is belied by a number of sources. API asks this Court to take judicial notice of information contained in letters written on September 3 and 23, 1985 by Representative John D. Dingell, Chairman of the House Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce. The letters show that DOE's Office of Hearings and Appeals concluded not only that identification of persons injured by crude oil overcharges was possible, but that it was possible to implement an "administratively workable" restitutionary mechanism. Appendix I, II. These conclusions are in direct conflict with the position urged upon the court by DOE, namely that identifying and compensating injured parties was a "futile" task. In addition, in the petition of Marathon, *et al.*, No. 85-430, for writ of certiorari before this Court, there is factual evidence which parties are prepared to present which demonstrates who absorbed the alleged overcharges in the sale of both controlled and decontrolled petroleum

products. Thus, TECA accepted on summary judgment the government's contention that it is "impossible" to ascertain who is injured by crude oil overcharges, despite evidence that OHA concluded it is practicable to do so. TECA's refusal to even attempt to explore factual material which is relevant in identifying and compensating parties suffering loss is reversible error.

B. THIS COURT HAS FOUND THAT COMPLEX ISSUES SHOULD NOT BE DECIDED ON AN INADEQUATE RECORD

There can be no doubt that summary judgment must be denied when there are material issues of fact in dispute and that the moving party has the burden of showing a lack of a dispute. 6 J. MOORE, MOORE'S FEDERAL PRACTICE, ¶56.15[3] (2d ed. 1985). *See also Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). This Court though, has also recognized the need for a fully developed record in cases involving complex issues of public importance. Such is the duty of a court in order to effect sound judicial administration. In a case which present analogies to the instant case, this Court in *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948), vacated a lower Court's grant of summary judgment for this reason. Justice Jackson stated that "summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import. . ." *Id.* at 256-57. Moreover, in words applicable to this case, he indicated that even if the record before the court could support issuing a summary judgment, good judicial administration demanded that the motion be denied in certain instances:

> We consider it the part of good judical administration to withhold decision of the ultimate questions involved in this case until this or

> another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.

Id.

In short, even in instances where there is some question regarding the materiality of contraverted facts, where the total complexity of the issues raised, both legal and factual, would benefit from the taking of additional evidence or argument, it is an abuse of a court's discretion to render a summary judgment.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

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December 23, 1985

APPENDIX I

U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, D.C. 20515

September 3, 1985

Honorable Danny J. Boggs
Deputy Secretary
Department of Energy
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1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Mr. Boggs:

Thank you for your August 20, 1985 reply to my letter of July 30 in which I expressed considerable disagreement, based on the record of investigations by this Subcommittee and the General Accounting Office (GAO), with the June 21, 1985 "Statement of Restitutionary Policy" issued by you in conjunction with the issuance by the Department of Energy's (DOE) Office of Hearings and Appeals (OHA) of its June 19 report concerning the *Stripper Well* litigation.

It is disturbing that you and the DOE counsel do not want to present to the court a complete story concerning DOE's restitutionary practices, together with the views of the Chairman of the House Committee with legislative and oversight jurisdiction over your Department and this program. Presenting one side only misleads the court and could cause the court to decide on the mistaken belief that

Congress and the DOE are in accord in this matter. I urge you to reconsider this matter before September 16.

As part of your reconsideration, I urge you to consider the following comments.

As you know, as long ago as March 14, 1985 I wrote to the Secretary of Energy (copy enclosed) about the OHA report and expressed concern about the status of the OHA report. In that letter, I said:

> If, despite this letter, anyone at DOE reviews or coordinates the OHA report, the Subcommittee expects to receive from OHA not only the final version, but also the OHA draft version, and from the DOE, the identity of all persons inside or outside DOE who reviewed the OHA draft report. No one should destroy the evidence this time.

After receiving an April 12 reply from Mr. Rayburn Hanzlik in which he indicated that an "internal review process' of the OHA report would take place at the DOE, I again wrote to the Secretary on April 9 (copy enclosed). I said:

> Subcommittee specifically reiterates its earlier request that each draft of the report (including any recommendations) that is made available to *anyone* outside of OHA be retained and provided to the Subcommittee after the report is issued.

I subsequently learned through our investigation of this matter that a draft report was prepared by OHA and given, as part of the "internal review process" dictated by DOE officials, to several such officials in early April. I also learned that DOE officials met in April and early May regarding this report. At those meetings, these officials made their views known to the OHA about the report.

Subsequently, the DOE received an order dated May 7, 1985 from the court confirming the claims in my March and April letters, that this was to be a report by OHA, not DOE. Accordingly, on June 13, 1985 Secretary Herrington wrote (copy enclosed) assuring me that DOE will comply with the court's order. He said:

> OHA will report the results on its fact-finding on the tracing of the overcharges without editing or modification by other parts of the Department. The Department will also provide its recommendations to the court, but the exact way in which this will be done has not yet been finally determined.

Unfortunately, as I show in this letter, the damage was done *before* issuance of the court's order. The OHA had been beaten into submission by the "internal" process described by Mr. Hanzlik. Its draft report was not liked by the DOE officials. This was understood by OHA and it was re-written to be a more bland report with a fact finding more to the DOE's liking.

When the report was issued in June, Mr. James U. DeFrancis of the DOE provided a copy to the Subcommittee by letter of June 24. On July 30, I wrote Mr. DeFrancis (copy enclosed) thanking him for the report and reminded the DOE of my earlier request for copies of the draft OHA report and the identity of the officials outside OHA who received that draft. On August 20 the OHA wrote to me "in response" to my letter to Mr. DeFrancis and provided a copy of the draft report.

The OHA said:

> Only one draft was circulated to persons outside of the Office of Hearings and Appeals. On April 1, 1985, we provided five copies of this

> draft to the Administrator and Deputy Administrator of the Economic Regulatory Administration. Subsequently, we supplied one copy of the draft to the Assistant Secretary for Congressional, Intergovernmental and Public Affairs. We understand that ERA subsequently provided copies to the Office of General Counsel and to the Deputy Secretary.
>
> A copy of this draft is enclosed. The information contained in this document is of a sensitive nature, representing the predecisional processes of the agency, and is exempt from mandatory public disclosure pursuant to Exemption 5 of the Freedom of Information Act, 5 U.S.C. Sec. 552(b)(5). We request that the Subcommittee exercise special care in the storage and handling of this draft to ensure its confidentiality and to protect against disclosure.

Let me state first that I disagree with the DOE claim of exemption from public disclosure, as this report was always to be a reply to a court order. *No* agency "predecisional process' was intended by the court (as is clear by the court's May 7 order although the DOE and OHA *improperly* went thru such a process prior to the May 7 order. Indeed, there never should have been any such "internal review process". No DOE policy was involved. DOE was free to adopt whatever policy, position, or decision it wanted separate from the court-ordered report. The Freedom of Information Act was not intended to exempt from disclosure documents of this nature. The OHA misapplies the Act in this case.

In regard to the draft OHA report, it is substantially different in content, substance, and tone (from introduction to end) from the final OHA report. Indeed, the very first

paragraph of the "Introduction" of the draft report differs (after the second sentence) from the public report.

The public report states:

> On May 7, 1985, the District court issued an order which clarified the manner in which the fact-finding report from OHA was to be submitted. *In re: The Department of Energy Stripper Well Exemption Litigation*, MDL. No. 378 (D. Kan., May 7, 1985) (order denying motion to expedite issuance of OHA's report).
>
> In that decision, the court ordered the OHA to issue its findings of fact of the tracing and impact of the overcharges in one separate report without editing or modification by the DOE. *Id., slip op.* at 7. Recognizing that the DOE's position on the utility of further efforts by the OHA and a recommended plan of restitution was a matter of agency policy, the court directed that these concerns be addressed in a second report "which shall be issued separate from the report of the OHA's fact-findings." *Id.* This report sets forth the OHA's analysis and findings of fact regarding the absorption of the impact of these crude oil overcharges by the U.S. domestic refining industry.

The report states:

> This report sets forth findings of fact regarding the absorption of the impact of crude oil overcharges by the U.S. domestic refining industry. The ultimate conclusion is reached that members of the refining sector of the domestic petroleum industry absorbed a portion of the overcharges and should be compensated. It also includes recommendations for a restitutionary

> mechanism which can be implemented efficiently. The refund mechanism which is recommended to the court would apply to refiners, other Entitlements Program participants, and consumers of refined petroleum products, such as utilities and airlines, that purchased product directly from refiners. It does not cover resellers or purchasers of products from resellers.

Most importantly, the OHA Findings of Fact set forth in the public report differ from those in the non-public draft. Further, a whole chapter entitled "V. Standards for the Fact-Finding Process' is omitted in the final report. In addition, the public report ends with the Findings of Fact, i.e. chapter VI. The draft report does not. It includes another chapter entitled "VIII. Recommendation of Restitutionary Mechanism."

All of these changes were apparently made as a result of the negative attitude expressed by DOE officials, such as yourself, after April 1 to the draft OHA report as part of DOE's improper "internal review process". OHA, which, of course, is *not* truely independent of the Deputy Secretary, the General Counsel or other DOE officials, apparently carved under the pressure exhibited through this negative attitude of DOE officials and re-wrote the drft to de-tone it, eliminate two whole chapters, and *change the findings.* The very thing I feared and predicted in my correspondence in March and April occurred. In my view, that action (under your auspices and other DOE officials was in violation of both the spirit and words of both court orders.

The OHA was not allowed to be a free agent. Indeed, OHA personnel were, as expected, "good soldiers" and adhered to the DOE policy-line, i.e. bring this program to

an end, do nothing to require more resources that could extend the program, and most importantly, use these funds to reduce the Federal budget deficit in the name of restitution. OHA had no choice because OHA lacked support at DOE for a refund policy.

I again request that you provide before September 16 a copy of my letter of July 30 to the court, together with this letter, and a copy of the OHA draft report.

Such disclosure is necessary not because the final report failed to include OHA's draft Chapter VIII, although I believe it properly should have been included because (despite OHA's mistaken characterization of the chapter as "policy") it informs the court on how to implement an administrative refund process, but because the fact finding of OHA was changed even slightly and a whole chapter relating to that fact finding was deleted after the OHA released the report to you and other DOE officials. Once that change occurred, the report lost its character as an OHA report, even though the mechanics of change were undoubtedly done by OHA and not the DOE officials. The DOE officials' interference did not stop at chapter VIII. It extended to the body of the report and the Findings of Fact. The court needs to be aware of this. Even with this knowledge, the court may adopt your policy. But without it, the court will be misled by the public report.

In addition, I request that you provide:

(a) a list of *all* persons within DOE (other than OHA) and at other agencies who received a copy of the April 1 draft or any later draft,

(b) a list of the dates of all meetings concerning this report and the identity of the participants,

(c) an explanation why the assurances provided by

the Secretary to me were apparently ignored by DOE officials in regard to this draft, and

(d) a copy of all memoranda, notes, and other documents (including marginal notes on each copy of the draft) prepared by DOE officials outside OHA regarding this report.

In conclusion, it is not my intention at this time to release this draft report. I believe that the OHA and DOE has an obligation to do so. But I will consider that view, depending on your response to me, after September 16. I understand that the court has set September 22 as the next date for briefing on these matters. Clearly, the court should be informed of these matters by then.

Sincerely,

JOHN D. DINGELL
Chairman
Subcommittee on
Oversight and Investigations

Enclosures (4)

cc: Honorable Philip R. Sharp, Chairman
Subcommittee on Fossil and Synthetic Fuels

Honorable Edward J. Markey, Chairman
Subcommittee on Energy Conservation and Power

Honorable James T. Broyhill, Ranking Minority Member
Subcommittee on Oversight and Investigations

Honorable James A. McClure, Chairman
Senate Committee on Energy and Natural Resources

Honorable J. Bennett Johnston, Ranking Minority Member
Senate Committee on Energy and Natural Resources

Honorable William H. Gray, III, Chairman
Committee on the Budget

Honorable Sidney R. Yates, Chairman
Subcommittee on Interior and Related Agencies

Honorable John S. Herrington, Secretary
Department of Energy

Honorable Joseph R. Wright, Jr., Acting Director
Office of Management and Budget

Honorable Charles A. Bowsher, Comptroller General
General Accounting Office

Honorable John Carlin, Chairman
National Governor's Association

Honorable Francis X. Bellotti
Attorney General of Massachusetts
President
National Association of Attorneys General
444 North Capital Street, N.W., Suite 403
Washington, D.C. 20001

Honorable Rayburn Hanzlik, Administrator
Economic Regulatory Administration
Honorabled George B. Breznay, Director
Office of Hearing and Appeals
Department of Energy

APPENDIX II

U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, D.C. 20515

September 23, 1985

Honorable Danny J. Boggs
Deputy Secretary
Department of Energy
Forrestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Mr. Boggs:

Except to the extent your September 19, 1985 reply to my September 3 letter identifies the numerous persons (outside the Office of Hearings and Appeals (OHA)) who were given copies of the April 1, 1985 OHA draft *Stripper Well* report and lists some of the "numerous meetings" by you and others in the Department to "discuss the Report and the Statement of Restitutionary Policy", your letter is somewhat misleading. Let me explain why I believe that to be the case.

First, you agree that the final OHA report and the April 1 draft "differ" in tone, but you contend that the "substance of the factual findings is exactly the same." Your interpretation and mine of what is encompassed by the word "substance" may differ. However, I believe it relevant to point out that the "words" and "emphasis", not just "tone", were changed significantly. For example, the publicly released June 1985 report states (pp. 77-78):

Each of the methods presented for determining who bore the impact of the MDL 378 overcharges is subject to valid criticisms. One of those methods – refiner-per-barrel profit analysis – is not relied upon in this Report, except as part of the "big picture." The other – an analysis of refiner cost banks – is relied upon only to the extent that the absence of cost banks indicates complete passthrough of the impact of MDL 378 overcharges. Although marginal economic analysis rests upon assumptions and estimations, we find that the use of marginal economic analysis with econometric estimation techniques provides the best possible indication of the extent to which the domestic refining industry bore the impact of the MDL 378 overcharges. Unlike the other methods suggested by some parties, marginal economic analysis answers an appropriate question, namely, to what extend did product prices rise when the refining industry experienced small crude oil cost increase. It does not, however, answer the question with respect to any particular firm. As noted previously in this report, to determine the extent to which a particular refiner passed through the impact of the MDL 378 overcharges, a number of factors specific to the operations of that refiner must be analyzed. We know of no methodology that would accomplish analyses of those factors, and no party in this proceeding has suggested such a methodology. Marginal economic analysis analyzes industry-wide data and produces results which estimate the *average* amount of cost absorption by refiners as a class. The impact sustained by individual refiners will, of course, vary from the industry-wide average.

The comparable paragraph in the of non-public April 1 draft report is shorter. It states (p. 73):

> Each of the methods presented for our use to determine who bore the impact of the MDL 378 overcharges is subject to valid criticisms. One of those methods – refiner per-barrel profit analysis – is not relied upon in this determination, except as part of the "big picture." The analysis of refiner cost banks is relied upon only to the extent that the absence of cost banks indicates complete passthrough of the impact of MDL 378 overcharges. We find that the use of marginal economic analysis with econometric estimation techniques provides the best possible indication of the extent to which the domestic refining industry bore the impact of the MDL 378 overcharges. Unlike the other methods suggested by some parties, marginal economic analysis answers the appropriate question in this proceeding, namely, to what extent did product prices rise when the refining industry experienced a small crude oil cost increase. It also yields precise numbers with a high level of confidence.

Whether these and other changes in words and emphasis are "substantial" or not is a question for all to judge (particularly the Court), not just the Department of Energy (DOE). You are asking the Court, the parties, the public and this Subcommittee to accept your judgment on faith of what is substantial. But your judgment is colored by your desire to have your policy adopted. By keeping the contents of the draft locked up at DOE, you want to leave all in the dark as to alternatives. I believe the Court and the public, not you, should decide this matter.

I point out one word change in the above paragraphs

that, I believe, changes the emphasis significantly. The fifth sentence of the both paragraphs is virtually identical.The difference lies with a change of an article "an" to "the". Thus, the public report states the "marginal economic analysis answers *an* appropriate question", while the draft states it "answers *the* appropriate question". Is that "minor"? Is the "substance exactly the same"? The court could easily conclude "No it is not," particularly in light of other changes in the paragraph.

There are other significant changes in the findings. Most importantly, chapter V (deleted in the final version) indicates the standards used by the OHA in its fact-finding. Your letter does not discuss that deletion. I feel certain that the Court, the parties, and the public would welcome this information and consider it "substantial" to the fact-finding.

Second, you state:

> Whatever few changes made to the substance of the factual determinations as OHA proceeded from the April 1 Draft to the final Report were made entirely within OHA and without review, approval or other such involvement by persons outside OHA. I am assured by the Director of the OHA that the findings of fact were made in strict compliance with the Court's May 7 Order.

Clearly, there were far more than a "few changes" to the entire report, even though all such changes were, as you state, "technically" made "within OHA". While I am certain that the OHA Director honestly believes that the findings were "in strict compliance" with the Order, the fact remains that between April 1 and May 7, the DOE had ample opportunity, as your letter shows to "influence" the changes. The May 7 and 10 meetings were clearly fresh in

the OHA Director's mind when the changes were made. The die was cast by the time you and he learned of the May 78 Order. DOE did not like OHA's report or any recommendation for further proceedings. The treasury solution was the DOE policy. The report needed change to allow that policy. Indeed, *all* of the changes seem to coincide neatly with that view as expressed in your June policy statement. By indirection, the OHA Director re-worked the draft to make it bland and "in synch" with your "policy".

Third, your letter interprets the Court's May Order very conservatively by saying: "Given the Court's May 7 Order, such recommendations and policy decisions simply had no place in the fact-finding report." Earlier your Department bent over backwards to interpret the Court's first Order liberally as giving DOE wide leeway to review the report and make changes.

However, the May 7 Court Order did not change the earlier Order of the Court where, as noted by OHA in the draft report, the Court said it "will also welcome the views of the OHA on how restitution can best be achieved in this case." The Court encouraged OHA to make recommendations or views on restitution. OHA did so in the draft report which you are seeking to withhold from the Court and the public. The May 7 Order supplemented the 1983 Order. It did not change it. It made clear, however, that review and change by DOE was improper.

In the May 7 Order, the Court said:

> This Court referred this legislation to the OHA only to take advantage of the procedures and expertise which the OHA had developed in tracing the impact of overcharges on the oil industry.

> This litigation was referred to the OHA for its determination of which parties had suffered injury in what amounts. That determination is solely a question of fact. *The Court did not intend to allow the DOE to make the policy decisions on whether such an attempt at tracing is feasible or how to actually make restitution, although the Court is interested in the DOE's position on these matters.* (Underlining supplied)

Chapter VIII of the April 1 draft OHA report states:

> *The following sections present a restitutionary mechanism to implement the factual findings cotained in this determination which we believe is administratively workable.* The mechanism provides for the processing of refund applications filed by direct purchasers of MDL 378 crude oil, Entitlements Program participants, and consumers of refined petroleum products that purchased those products directly from refiners. These applications can be accepted promptly upon announcement of a payment proceeding. We recognize that his undertaking will require the dedication of significant resources. *If directed by this Court, the Office of Hearings and Appeals is ready to assist in this endeavor.* (Underlining Supplied)

While the Court may disagree, I believe that the OHA recommendation is, in effect, an OHA view on "how to actually make restitution", based on its fact-finding. So long as you refuse to allow OHA to release its draft, the Court will never have the opportunity to agree or disagree. Again I urge that, as a minimum, you release the April 1 draft to the Court. Let the Court decide its value.

Since receiving your September 19 letter, I received the enclosed September 12 Order by Judge Frank G. Theis. Strangely, you mention that the "question of whether the April 1 Draft should be made available to the parties is now before the Court on a discovery motion," but you did not mention the September 12 Order. Please provide a copy of your reply to that Order.

In view of the fact that the Court is now aware of the April 1 draft and has issued the September 12 Order, I will not, at this time, release the draft report. I am not, however, convinced by your arguments for non-disclosure and will probably release the draft report if you do not furnish it to the Court pursuant to the September 12 Order. I believe your reasons for wanting to retain "confidentiality" have nothing to do with protecting even a modicum of the "deliberative process", but are aimed at preserving your Federal deficit cutting, non-restitutionary policy of last June. The so-called "deliberative process' would *not* "be seriously impaired" by disclosure of the draft to the Court. In fact, the extent to which the April 1 draft was widely circulated within the DOE, (in violation of the Court's Order of 1983) makes a mockery of that process, particularly insofar as you equate the OHA process with that of a "Special Master." I have never known a Special Master to have his drafts reviewed extensively by persons not under with the Special Master.

In your reply on page 3 of your letter, you state there were "numerous meetings" to discuss the report and the "Statement of Restitutionary Policy". When was that policy prepared and first circulated? Who received it? Was a draft of it provided in any form to the OHA Director at the May 7 or 10 meetings? When was the Director first

made aware of the policy? What were the nature of the May 7 and 10 discussions which you attended?

Finally, I note your continued refusal to file my letter with the Court. You state:

> Courts have repeatedly held that the views of individual members of Congress, even if they are committee chairmen, are to be given no weight in construing or applying Federal law, except as they may be part of pre-enactment commentary on legislation being enacted, so that the Courts can discern the views of the Congress as a body at the relevant time of its adoption of legislation.,

If this is so, then I wonder why you have declined to make my views known to the Court. If, as you state, the Court will give my views on DOE policy "no weight," so be it. There can be no harm to DOE in providing them so they will be before the Court. The Court, of course, is free to reject, ignore, or consider them.,

You note that one of the parties attached a copy of my September 3 letter with their motion. That is interesting. However, I prefer that the Government, not a private party, as a courtesy provide my views to the Court. I do not think it unreasonable to ask that you extend this courtesy to me or any other Member of Congress.

I again urge that you release the April 1 draft to the Court and that you provide my letters to the Court, including this letter.

I request your reply by October 7, 1985.

Sincerely,

/s/ John D. Dingell
JOHN D. DINGELL
Chairman
Subcommittee on
Oversight and Investigations

Enclosure (1)

cc: Honorable James T. Broyhill
Ranking Minority Member

Honorable John S. Herrington, Secretary
Department of Energy

Mr. Marshall Staunton, Acting Administrator
Economic Regulatory Administration
Department of Energy

Honorable George B. Breznay, Director
Office of Hearings and Appeals
Department of Energy

Honorable Charles A. Bowsher, Comptroller
General Accounting Office

MOTION FILED

DEC 27 1985

No. 85-429
No. 85-430

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EXXON CORPORATION, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Respondent.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The American Petroleum Institute (API) respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorneys for both petitioners and respondent herein have been obtained. In addition, the consent of the attorneys for 11 other parties herein has been obtained, but the attorneys for 12 parties herein refused to consent to the filing of a brief by API as *amicus curiae*. The remaining parties have not responded to API's request for consent. Copies of all letters have been logged with the Clerk.

The applicant, American Petroleum Institute (API), has an interest in the case in that API is a trade association

representing approximately 215 member companies and 8,000 individual members. API's members are engaged in all facets of the petroleum industry including the production, refining, and marketing of crude oil and refined petroleum products. Throughout the time periods involved in this case, API members were subject to the price and allocation laws and regulations adopted by the Congress and the Department of Energy (and its predecessor agencies) governing the sale and distribution of crude oil and petroleum products.

API members have a vital and legitimate interest in the remedy entered and affirmed by the lower courts disposing of almost $2 billion for alleged overcharges associated with the sale of crude oil produced from the Hawkins Field. By affirming the district court's award of all alleged overcharges to the states in accordance with Section 155 of the Furthering Continuing Appropriations Act of 1983, commonly known as the "Warner Amendment", Pub.L. No. 97-377, 96 Stat. 1830, 1919 (1982), the Temporary Emergency Court of Appeals (TECA) categorically and arbitrarily denied every member of the petroleum industry, including many API members, their due process rights to demonstrate they were entitled to receive a portion of the alleged overcharges. API files this *amicus curiae* brief asking the Court to rectify this unfair and unprecedented denial of the legal rights of its members which unquestionably affects their economic interests.

Although the briefs of the petitioners herein in the Temporary Emergency Court of Appeals argue that the remedy chosen was in conflict with law, API believes that the decisions of the courts below raise broader questions about the general restitutionary powers of the federal

courts. If applicant's argument is approved by this Court, the decisions of the courts below must be reversed.

Respectfully submitted,

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December 26, 1985